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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 435

NEW YORK RAPID TRANSIT CORPORATION,
APPELLANT,

vs.

THE CITY OF NEW YORK

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK

FILED SEPTEMBER 18, 1937.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

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NEW YORK RAPID TRANSIT CORPORATION,
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INDEX.

	Original	Print
Record on appeal to Court of Appeals of New York.....	1	f
Statement under Rule 234	1	1
Notice of appeal to the Appellate Division.....	2	1
Order appealed from.....	3	2
Notice of motion to dismiss the complaint.....	4	2
Amended complaint	5	3
Exhibit "A"—Chapter 873 of the Laws of the State of New York of 1934.....	42	28
Exhibit "B"—Chapter 601 of the Laws of the State of New York of 1935.....	45	30
Exhibit "C"—Local Law No. 21 of 1934 as amended by Local Law No. 2 of 1935.....	49	33
Exhibit "D"—Local Law No. 30 of 1935.....	63	42
Stipulation as to exhibits not printed.....	77	53
Opinion of Steuer, J.....	78	53
Waiver of certification	84	57
Notice of appeal to the Court of Appeals.....	85	58
Order granting leave to appeal to the Court of Appeals.	87	59
Order of affirmance—Appellate Division.....	88	59
Affidavit of no opinion by Appellate Division.....	90	60
Waiver of certification.....	91	60

Record on appeal to Court of Appeals of New York—Continued.

	Original	Print
Remittitur of Court of Appeals.....	92	61
Opinion, Finch, J., Court of Appeals.....	96	62
Order of Appellate Division on remittitur.....	101	69
Judgment of Supreme Court on remittitur.....	103	70
Order resettling judgment	105	71
Order allowing appeal.....	108	73
Petition for appeal.....	110	75
Assignments of error	116	79
Citation and service..... (omitted in printing) ..	121	
Bond on appeal..... (omitted in printing) ..	122	
Order as to Contract No. 4.....	127	82
Stipulation as to transcript of record.....	129	84
Clerk's certificate..... (omitted in printing)	131	
Statement of points to be relied upon and designation as to printing record	132	85

[fol. 1]

**IN SUPREME COURT OF NEW YORK, APPELLATE
DIVISION, FIRST DEPARTMENT**

NEW YORK RAPID TRANSIT CORPORATION, Plaintiff-
Respondent,

against

THE CITY OF NEW YORK, Defendant-Appellant

STATEMENT UNDER RULE 234

This action was commenced by the service of the summons and complaint on defendant on or about September 23, 1936. On October 9, 1936, plaintiff served an amended complaint.

Defendant on October 29, 1936, served a notice of motion to dismiss the complaint and direct judgment for defendant for failure to state a cause of action. Defendant appeals from the order denying said motion.

Plaintiff appeared by George D. Yeomans and defendant appeared by Paul Windels, Corporation Counsel.

There has been no change of parties or of attorneys herein.

[fol. 2] **IN SUPREME COURT OF NEW YORK, NEW YORK
COUNTY**

[Title omitted]

NOTICE OF APPEAL TO THE APPELLATE DIVISION

SIRS:

Please take notice that the defendant hereby appeals to the Appellate Division of the Supreme Court, First Department, from the order entered herein in the office of the Clerk of the County of New York on or about the 15th day of January, 1937, denying defendant's motion to dismiss the complaint herein, and the defendant appeals from each and every part of said order as well as from the whole thereof.

Dated, February 11, 1937.

Yours, etc., Paul Windels, Corporation Counsel, Attorney for Defendant, Office and Post Office Address, Municipal Building, Borough of Manhattan, New York City.

[fol. 3] To, George D. Yeomans, Esq., Attorney for Plaintiff, 385 Flatbush Avenue Extension, Borough of Brooklyn, New York City. Hon. Albert Marinelli, Clerk of New York County.

IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK,
SPECIAL TERM, PART III

Index Number 27747—Year 1936

NEW YORK RAPID TRANSIT CORP.

against

THE CITY OF NEW YORK

Present: Hon. Aron Steuer, Justice

ORDER APPEALED FROM

The following papers read on this motion, argued—Dec. Res.—this 6th day of Jan., 1937. Motion Calendar No. 788.

Notice of Motion and Annexed Complaint—

Papers
numbered

Cont. #4 (with MC782 27746/36) 1-3

[fol. 4] Upon the foregoing papers this motion is disposed of in accordance with memorandum filed herewith.

Dated, Jan. 14th, 1937.

Enter.

A. S., J. S. C.

Brief in Opposition—A.

IN SUPREME COURT OF NEW YORK, NEW YORK COUNTY

[Same Title]

NOTICE OF MOTION TO DISMISS COMPLAINT

Please take notice that upon the summons and amended complaint herein, duly verified on the 9th day of October, 1936, and all the proceedings herein, a motion will be made at Special Term, Part III of this court, at the Court House thereof, Foley Square, Borough of Manhattan, City of New York, on the 10th day of November, 1936, at 10 o'clock in

the forenoon of that day, or as soon thereafter as counsel can be heard, for an order dismissing the complaint herein and directing judgment for the defendant, on the grounds that the complaint does not set forth facts sufficient to state a cause of action and that the Court has no jurisdiction of [fol. 5] this action, and for such other and further relief as to this Court may seem just and proper.

Dated, New York, October 29, 1936.

Yours, etc., Paul Windels, Corporation Counsel, Attorney for Defendant, Office & P. O. Address, Municipal Building, Borough of Manhattan, City of New York.

To George D. Yeomans, Esq., Attorney for Plaintiff, 385 Flatbush Avenue Extension, Borough of Brooklyn, City of New York.

IN SUPREME COURT OF NEW YORK, NEW YORK COUNTY

[Same title]

AMENDED COMPLAINT

The plaintiff, complaining of the defendant, by George D. Yeomans, its attorney, alleges, upon information and belief,

First. The plaintiff is a corporation organized and existing under the laws of the State of New York, having its principal office at 385 Flatbush Avenue Extension, Borough of Brooklyn, County of Kings, City and State of New York.

Second. Defendant is and at all times hereinafter mentioned was a Municipal Corporation organized and existing under the laws of the State of New York, being the only City in the State of New York having a population of a million inhabitants or more.

Third. The sole business of the plaintiff is the operation of certain rapid transit railroads in the City of New York under a contract made by and between the defendant and New York Municipal Railway Corporation, a predecessor in title of the plaintiff, which contract was made under and pursuant to the provisions of the Rapid Transit Act, Chapter 4, of the Laws of 1891, as amended, and is known and

hereinafter referred to as "Contract No. 4," the same bearing date the 19th day of March, 1913. Said Contract No. 4, by reference thereto, is hereby made a part of this complaint.

Fourth. By the terms of said Contract No. 4 the defendant agreed to construct certain rapid transit railroads in the City of New York and said New York Municipal Railway Corporation agreed to contribute to the cost of such construction and to equip said railroads for operation, as well as to reconstruct and build additions to certain existing railroads then belonging to New York Consolidated Railroad Company, which said New York Municipal Railway Corporation then had the right and was under obligation to operate, so as to adapt said existing railroads for operation in conjunction with the said railroads to be constructed by the defendant. By said Contract No. 4 the defendant leased the said railroads which it agreed to construct and the equipment thereof to said New York Municipal Railway Corporation, its successors and assigns, for a term of forty-nine years commencing on or about the 1st day of January, 1917, subject to earlier termination as in said contract provided, and said New York Municipal Railway Corporation agreed to operate said railroads to be constructed by the defendant, in conjunction with the said existing railroads belonging to said New York Consolidated Railroad Company, for a single fare and as one system, pooling the gross receipts from whatever source derived, directly or indirectly, from, out of or in connection with the operation of all the said railroads combined, and to pay over to the defendant fifty per cent. of the said gross receipts remaining after the deduction of various items, among which are the following which the said contract, in Subdivisions 1 to 9, inclusive, of Article XLIX, thereof provides shall be deducted from gross receipts in the order named, viz:

1. Rentals payable by the Lessee for the use of property in connection with the railroads under contracts or leases approved by the Commission.

2. Taxes and assessments.

3. Operating expenses.

4. 12% of the revenue for maintenance, including repairs and replacements, but not including depreciation.

5. Payments into depreciation funds.

[fol. 8] 6. \$3,500,000 per annum, payable to the Lessee as representing the average annual income from the operation of the said existing railroads during the two years prior to the date of the beginning of initial operation under said Contract No. 4.

7. Interest payable to the Lessee on the Lessee's contribution toward the cost of construction, the cost of equipment of the City-owned railroads and the cost of extensions and additional tracks and the reconstruction of said existing railroads.

8. Interest payable to Lessee on the cost of additional equipment and additions to existing railroads plus one per centum per annum of such cost for sinking fund purposes.

9. Interest payable to the City of New York on its investment in the said railroads.

Fifth. Under date of January 31, 1913, prior to the execution of said Contract No. 4, a certain contract known as the "Operating Contract" was entered into by and between said New York Municipal Railway Corporation and said New York Consolidated Railroad Company, which provided that the said New York Municipal Railway Corporation should have the right and it thereby agreed during the term specified in said Operating Contract to maintain and operate the railroads and property of said New York Consolidated Railroad Company as therein and in said Contract No. 4 described. Thereafter, under date of March 25, 1913, a certain agreement of assignment and lease was entered into by and between said New York Municipal Railway Corporation and said New York Consolidated Railroad Company, wherein and whereby said New York Municipal Railway Corporation assigned to said New York Consolidated Railroad Company all of the rights and obligations of said New York Municipal Railway Corporation under said Contract No. 4 with respect to the maintenance and operation of the rapid transit railroads to be constructed under said contract by the defendant and the maintenance and operation in conjunction therewith of the railroads and properties of said New York Consolidated Railroad Company mentioned and described in said Contract No. 4, and it was provided that unless and until the said as-

signment and lease should be terminated, said Operating Contract dated January 31, 1913, should be suspended.

Sixth. Thereafter and on or about the 31st day of December, 1918, said New York Municipal Railway Corporation and New York Consolidated Railroad Company were put into receivership by an order of the District Court of the United States, for the Southern District of New York, in an action entitled "Westinghouse Electric & Manufacturing Company, plaintiff, against Brooklyn Rapid Transit Company, New York Municipal Railway Corporation and New York Consolidated Railroad Company, defendants," and said New York Municipal Railway Corporation and said New York Consolidated Railroad Company remained in receivership under the jurisdiction of said District Court of the United States until after June 5, 1923, on which date, by order of said District Court, all of the assets of both of said corporations, including all of their rights under said Contract No. 4 were sold and assigned to Albert H. Wiggin, Gerhard M. Dahl and Frederick Strauss, such sale being [fol. 10] confirmed by decree of that Court dated June 7, 1923. On or about the 14th day of June, 1923, said Albert H. Wiggin, Gerhard M. Dahl and Frederick Strauss assigned and transferred all of the said assets formerly belonging to said New York Municipal Railway Corporation and said New York Consolidated Railroad Company to the plaintiff in this action.

Seventh. Ever since the said 14th day of June, 1923, the plaintiff, as Lessee under said Contract No. 4, has maintained and operated, and still maintains and operates the said existing railroads formerly owned by New York Consolidated Railroad Company, and the said railroads constructed and owned by the City of New York, as one system under and in accordance with the terms of said contract, and the operation of said railroads under said contract has been since June 14, 1923, and still is the only business of the plaintiff.

Eighth. Plaintiff is and at all times since June 14, 1923, was a common carrier lawfully engaged in the operation of said rapid transit railroads in the City of New York under said Contract No. 4 and consequently at all the times hereinafter mentioned the plaintiff was and still is under the supervision of the Transit Commission, which is the Metro-

politan Division of the Department of Public Service, although said Transit Commission has no power to authorize any increase in the rate of fare which the plaintiff may charge its passengers.

Ninth. In August, 1934, the Legislature of the State of New York passed a bill which, with the approval of the Governor, became a law on August 18, 1934, known as [fol. 11] Chapter 873 of the Laws of 1934, and a copy thereof, Marked Exhibit A, is hereto annexed and made a part hereof.

Tenth. In April, 1935, the Legislature of the State of New York passed a bill which, with the approval of the Governor, became a law on April 29, 1935, known as Chapter 601 of the Laws of 1935, and a copy thereof, marked Exhibit B, is hereto annexed and made a part hereof.

Eleventh. The Municipal Assembly of the City of New York, acting under the alleged authority of said Chapter 873 of the Laws of 1934, passed a bill which, with the approval of the Mayor, on or about December 5, 1934, became Local Law No. 21 of the City of New York for the year 1934.

Twelfth. The Municipal Assembly of the City of New York, acting under the alleged authority of said Chapter 873 of the Laws of 1934, passed a bill which, with the approval of the Mayor, on or about February 27, 1935, became Local Law No. 2 of the City of New York for the year 1935, which said Local Law No. 2 of 1935 amended said Local Law No. 21 of 1934. Annexed hereto, marked Exhibit "C" and hereby made a part of this complaint is a copy of said Local Law No. 21 of 1934, as amended by said Local Law No. 2 of 1935, the words appearing in said copy in brackets being words originally contained in said Local Law No. 21 of 1934 which were stricken out by Local Law No. 2 of 1935, and the words in italics being new words added by said Local Law No. 2 of 1935 to the original language of said Local Law No. 21 of 1934.

[fol. 12] Thirteenth. The Municipal Assembly of the City of New York, acting under the alleged authority of said Chapter 873 of the Laws of 1934, as amended by said Chapter 601 of the Laws of 1935, passed a bill which, with the approval of the Mayor, on or about December 4, 1935, became Local Law No. 30 of the City of New York for the year 1935,

and a copy of said Local Law No. 30 of 1935, marked Exhibit "D," is hereto annexed and made a part hereof.

Fourteenth. Said Local Law No. 21 for the year 1934, both in its original form and as amended by said Local Law No. 2 for the year 1935, purports to impose upon every utility (as therein defined) doing business in the City of New York and subject to the supervision of either Division of the Department of Public Service, an excise tax for the privilege of exercising its franchise or franchises or of holding property, or of doing business in the City of New York during the calendar year 1935, or any part thereof, equal to three per centum of its "Gross Income" for the calendar year 1935, and purports to impose an excise tax on every utility (as therein defined) doing business in the City of New York, but not subject to the supervision of either Division of the Department of Public Service, for the privilege of exercising its franchise or franchises, or of holding property, or of doing business in the City of New York, equal to three per centum of its "Gross Operating Income" for the calendar year 1935, each utility, as therein defined, being required by the terms of said Local Law to file with the Comptroller of the City of New York each month, commencing with the month of February, 1935, and ending with the month of January, 1936, a return [fol. 13] showing its gross income, or gross operating income, as the case might be, for the preceding calendar month and to pay to the said Comptroller of the City of New York at the time of filing each return such portion of the tax purported to be imposed by said Local Law as should be equal to three per centum of its gross income, or gross operating income, as the case might be, for the period covered by such return.

Fifteenth. Said Local Law No. 30 of the City of New York for the year 1935 purports to impose upon every utility (as therein defined) doing business in the City of New York and subject to either Division of the Department of Public Service, an excise tax for the privilege of exercising its franchise or franchises, or of holding property, or of doing business in the City of New York from January 1, 1936, to June 30, 1936, or any part of such period, equal to three per centum of its "Gross Income" for the said period, and purports to impose upon every utility (as therein defined) doing business in the City of New York,

but not subject to the supervision of either Division of the Department of Public Service, an excise tax for the privilege of exercising its franchise or franchises, or of holding property, or of doing business in the City of New York, equal to three per centum of its "Gross Operating Income" for the said period from January 1, 1936, to June 30, 1936, each utility being required, by the terms of said Local Law, to file with the Comptroller of the City of New York each month, commencing with the month of February, 1936, and ending with the month of July, 1936, a return showing its gross income, or gross operating income, as the case might [fol. 14] be, for the preceding calendar month and to pay to the said Comptroller of the City of New York at the time of filing each return such portion of the tax purported to be imposed by said Local Law as should be equal to three per centum of its gross income, or gross operating income, as the case might be, for the period covered by such return.

Sixteenth. Both said Local Law No. 21 of 1934, as amended, and said Local Law No. 30 of 1935, contain provisions defining the word "Utility" as therein used as meaning "any person subject to the supervision of either Division of the Department of Public Service and every person, whether or not such person is subject to such supervision who shall engage in the business of furnishing or selling to other persons gas, electricity, steam, water, refrigeration, telephony and/or telegraphy, or who shall engage in the business of furnishing or selling to other persons gas, electric, steam, water, refrigeration, telephone or telegraph service." Both of said laws define the word "person" to include corporations and define the words "Gross Income" as therein used as meaning and including "receipts received in or by reason of any sale made (except sale of real property) or service rendered in the City of New York, including cash, credits and property of any kind or nature (whether or not such sale is made or such service is rendered for profit) without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or services or other costs, interest, or discount paid, or any other expense whatsoever; also profits from the sale of real property growing out of the ownership or use of or interest in such property; also profit [fol. 15] from the sale of personal property (other than property of a kind which would properly be included in the

inventory of the taxpayer if on hand at the close of the period for which a return is made); also receipts from interest, dividends and royalties, without any deductions therefrom for any expenses whatsoever incurred in connection with the receipt thereof, and also gains or profits from any source whatsoever." Both of said laws define the words "Gross Operating Income" to mean "receipts received in or by reason of any sale made or service rendered, of the property and services" specified in the definition of the word "utility" above referred to, "in the City of New York, including cash, credits and property of any kind or nature, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or services, or other costs, interest or discount paid, or any other expenses whatsoever."

Seventeenth. The acts of the legislature of the State of New York known as Chapter 873 of the Laws of 1934 and Chapter 601 of the Laws of 1935, under the alleged authority of which the said Municipal Assembly of the City of New York adopted said Local Laws No. 21 of 1934, No. 2 of 1935 and No. 30 of 1935, purport to authorize any city of the State of New York having a population of one million inhabitants or more, acting through its local legislative body, to adopt and amend local laws imposing any tax or taxes which the state legislature has or would have power and authority to impose, to relieve the people of any such city from the hardships and suffering caused by unemployment, provided that any tax imposed thereunder shall have application only within the territorial limits of [fol. 16] such city and shall be in addition to any and all other taxes.

Eighteenth. Said Chapter 873 of the Laws of 1934 and said Chapter 601 of the Laws of 1935 both provide in substance that revenues resulting from the imposition of taxes authorized by said Acts shall not be credited or deposited in the general fund of the City, but shall be deposited in a separate bank account or accounts and shall be available and used solely and exclusively for the relief purposes for which said Acts authorize the imposition of such taxes.

Nineteenth. Said Local Law No. 21 of 1934, as amended, and said Local Law No. 30 of 1935, each provides as follows:

"All revenues and moneys resulting from the imposition

of the taxes imposed by this local law shall be paid into the treasury of the City of New York and shall not be credited or deposited in the general fund of the City of New York but shall be deposited in a separate bank account or accounts, and shall be available and used solely and exclusively for the purpose of relieving the people of the City of New York from the hardships and suffering caused by unemployment, including the repayment of moneys borrowed for such purpose."

Twentieth. The said Local Law No. 21 of 1934, as amended by said Local Law No. 2 of 1935, and the said Local Law No. 30 of 1935, each provides for the enforcement and collection from utilities (as therein defined) of penalties for any failure to make a return or pay a tax under the provisions of and within the time required by said law, which penalties are fixed at 5% of the amount of the [fol. 17] tax required to be paid by the terms of said law, plus 1 per centum of such tax for each month of delay or fraction thereof excepting the first month after such return was required by the law to be filed or the tax to be paid.

Twenty-first. On the respective dates below specified the plaintiff, under protest and in order to avoid the threat of penalties, filed with the Comptroller of the City of New York returns of its gross income for the respective months herein below specified:

Date of Filing Returns	Period Covered by Returns
February 28, 1935	Month of January, 1935.
March 25, 1935	" February, 1935.
April 25, 1935	" March, 1935.
May 25, 1935	" April, 1935.
June 25, 1935	" May, 1935.
July 25, 1935	" June, 1935.
August 24, 1935	" July, 1935.
September 25, 1935	" August, 1935.
October 25, 1935	" September, 1935.
November 25, 1935	" October, 1935.
December 24, 1935	" November, 1935.
January 25, 1936	" December, 1935.
February 25, 1936	" January, 1936.
March 25, 1936	" February, 1936.
April 25, 1936	" March, 1936.
May 25, 1936	" April, 1936.
June 25, 1936	" May, 1936.
July 25, 1936	" June, 1936.

Twenty-second. Each of said returns last above mentioned was filed involuntarily and under written protest and under duress and compulsion of and in order to avoid the penalties purported to be provided for and which might be imposed under said Local Law No. 21 for the year 1934, as amended by said Local Law No. 2 for the year 1935 and under said Local Law No. 30 for the year [fol. 18] 1935 in the event of plaintiff's failure to make and file each of such returns.

Twenty-third. On the respective dates below specified plaintiff paid to defendant the respective sums below specified, being the respective amounts of alleged excise tax purported to be for the privilege of exercising its franchise or franchises or of holding property, or of doing business in the City of New York claimed by the Comptroller of defendant to be due from the plaintiff under said Local Law No. 21 for the year 1934, as amended by Local Law No. 2 for the year 1935, and under said Local Law No. 30 for the year 1935, the amount paid being three per centum of the gross income of plaintiff returned and reported as afore-said for the respective months hereinafter specified, to wit:

Date of Payment	Amount of Payment	Month on the Gross Income for Which the Payment Was Based
February 28, 1935	\$81,266.39	January, 1935
March 25, 1935	75,657.19	February, 1935
April 25, 1935	83,151.75	March, 1935
May 25, 1935	81,033.97	April, 1935
June 25, 1935	82,792.85	May, 1935
July 25, 1935	74,758.37	June, 1935
August 24, 1935	74,001.88	July, 1935
September 25, 1935	73,174.61	August, 1935
October 25, 1935	73,489.59	September, 1935
November, 25, 1935	80,547.44	October, 1935
December 24, 1935	75,949.31	November, 1935
January 25, 1936	79,264.51	December, 1935
February 25, 1936	78,843.10	January, 1936
March 25, 1936	76,451.68	February, 1936
April 25, 1936	81,967.90	March, 1936
May 25, 1936	77,927.02	April, 1936
June 25, 1936	82,941.00	May, 1936
July 25, 1936	75,478.44	June, 1936
Total	\$1,408,697.00	

[fol. 19] Twenty-fourth. Each of said payments last above mentioned was made involuntarily and under written protest and under duress and compulsion of and in order to avoid the penalties purported to be provided for and which might be imposed for the failure to make such payment under said Local Law No. 21 for the year 1934, as amended by said Local Law No. 2 for the year 1935, or under said Local Law No. 30 for the year 1935.

Twenty-fifth. The plaintiff is required to pay and has paid annually in advance to the State of New York under and pursuant to the provisions of Section 183 of the Tax Law of the State of New York a franchise tax "for the privilege of exercising its corporate franchise or of holding property in this state" (State of New York).

Twenty-sixth. Plaintiff is required to pay and has paid annually in advance to the State of New York under and pursuant to the provisions of Section 185 of the Tax Law of the State of New York an additional franchise tax "for the privilege of exercising its corporate franchise or carrying on its business in such corporate or organized capacity within this state" (State of New York), which said tax is equal to five-tenths of one per centum of its gross earnings from all sources within the State of New York.

Twenty-seventh. In addition to the franchise taxes mentioned in the two preceding paragraphs the plaintiff is required to pay annually a special franchise tax on the value of its property in and its special franchises to use the streets of the city in the maintenance and operation of its railroads.

[fol. 20] Twenty-eighth. Apart from the said taxes purported to be imposed by said Local Laws No. 21 of 1934, as amended, and No. 30 of 1935, the only taxes imposed or purported to be imposed by any laws adopted by the Municipal Assembly of the City of New York under and pursuant to the authority granted by Chapter 873 of the Laws of 1934 or Chapter 601 of the Laws of 1935, or for the purpose of unemployment or home relief, and effective during the period from January 1, 1935, to June 30, 1936, were

(1) a 2% sales tax payable by the purchaser, which tax was required to be paid by all utilities as well as by others,

(2) a tax of 2% on certain articles of personal property, which tax affected and applied to all utilities to the same extent as it affected and applied to other persons and corporations,

(3) a tax upon the transfer of estates of decedents, and

(4) a so-called excise tax for the privilege of carrying on or exercising for gain or profit within the City of New York any trade, business, profession, vocation or commercial activity, other than a financial business, equal to 1/10 of 1% upon the receipts in excess of \$15,000 from such profession, vocation, trade, business or commercial activity exercise or carried on in the City of New York, and a so-called excise tax for the privilege of carrying on any financial business for gain or profit within the City of New York, equal to 1/5 of 1% upon the gross income in excess of \$5,000 [fol. 21] received from such financial business carried on in the City of New York, these taxes being imposed on all individuals, copartnerships, societies, associations, joint stock companies, corporations and combinations of individuals exercising such privileges, excepting, however, utilities subject to tax under said Local Laws No. 21 of 1934, as amended, and No. 30 of 1935, they being exempted from the said tax of 1/10 of 1% in respect to their "gross income" or "gross operating income," as the case might be, upon which they were taxed at the rate of 3% under said Local Laws No. 21 of 1934, as amended, and No. 30 of 1935.

No excise tax is or was during the period from January 1, 1935, to June 30, 1936, imposed by any law of the City of New York upon any person or corporation, other than a utility, as defined in said Local Laws No. 21 of 1934 as amended and No. 30 of 1935, for the privilege of exercising franchises or of holding property or of doing business in the City of New York other than the said excise tax equal to 1/10 of 1% upon the receipts in excess of \$15,000 from any business carried on in the said City, excepting a financial business, and the said excise tax equal to 1/5 of 1% upon gross income in excess of \$5,000 received from any financial business carried on in the City of New York.

Twenty-ninth. All utility corporations operating in the State of New York are required by the laws of the State of New York to pay not only taxes for the privilege of exercising their respective corporate franchises and carry-

ing on their respective businesses in the State of New York, but also special franchise taxes on the values of their prop-
[fol. 22] erties in and their franchises to use public streets and other places.

Thirtieth. The rate of fare which plaintiff is permitted to charge for transportation of passengers on the railroads operated by it under said Contract No. 4 is and at all the times herein mentioned was limited to five cents per passenger, as provided in said Contract No. 4 and the defendant has heretofore refused to change the terms of said contract so as to permit any increase in the rate of fare that may be charged by the plaintiff.

Thirty-first. The State of New York has failed and refused to delegate to the Transit Commission or any Commission or body the power to increase the rate of fare which the plaintiff may charge for the transportation of passengers beyond the sum of five cents per passenger.

Thirty-second. By virtue of Local Law No. 16 of the City of New York for the year 1925, approved September 17, 1925, the charter of the City of New York was amended so as to provide that the local authority of the City of New York, to wit, the Board of Estimate and Apportionment, was forbidden to consider any resolution to increase the fare of five cents then and now provided for by law or by contract or franchise unless and until the proposal for the adoption of any such resolution shall have been first submitted to the People of the City of New York upon a referendum and approved by a majority vote of the qualified voters of such city.

Thirty-third. There is no way without the consent of the defendant in which the plaintiff can secure or could have [fol. 23] secured during the period from January 1, 1935, to June 30, 1936, the right to charge a rate of fare of more than five cents per passenger for the transportation of passengers on said railroads operated by the plaintiff under said Contract No. 4, and there is no way in which the plaintiff can or could have passed on to the public any part of the so-called taxes collected from it by the defendant under the provisions of said local laws or any part of any other taxes which the plaintiff is required to pay, whereas other corporations which were taxed at the rate of only one-tenth of one per centum on their gross receipts in excess of

\$15,000 from businesses conducted in the City of New York under Local Law No. 17 of 1934 and Local Law No. 32 of 1935 were and are in a position to pass on to the public such taxes as they were or may be required to pay, by increasing their prices for the goods sold of the services furnished by them.

Thirty-fourth. At the respective times of enactment of the said Local Laws No. 21 of 1934, No. 2 of 1935 and No. 30 of 1935 the defendant itself was operating, through its Board of Transportation, rapid transit railroads in the City of New York which were constructed by the defendant subsequent to the construction of the railroads mentioned in and covered by said Contract No. 4 and which ever since the commencement of operation thereof have competed and still do compete directly with the railroads operated by the plaintiff under said Contract No. 4, carrying passengers at a rate of five cents per passenger. Neither Division of the Department of Public Service has any supervision of or over the railroads thus operated by the Board of Transportation for the defendant, nor was the defendant, The City of New York, or its Board of Transportation, required to obtain from the Transit Commission or from either Division of the Department of Public Service, a certificate of convenience and necessity for said railroads before constructing and operating the same. Some of said railroads constructed and operated by the defendant through its Board of Transportation run directly parallel to and in the same streets over and along which railroads mentioned and described in said Contract No. 4 are operated by the plaintiff, as, for instance, the new underground railroad in Fulton Street, in the Borough of Brooklyn, City of New York, over and along which street the plaintiff maintains and operates an elevated railroad under said Contract No. 4. These new railroads operated by the defendant directly and seriously compete with the railroads operated by the plaintiff under said Contract No. 4, causing a substantial loss of income to the plaintiff and the plaintiff has no protection whatever against such competition. Moreover the revenue from the said new railroads operated by the Board of Transportation for the defendant is not subject to any tax under said Local Laws.

Thirty-fifth. At the time of the passage of said Local Law No. 21 of the City of New York for the year 1934,

and at the time of the passage of said Local Law No. 2 of the City of New York for the year 1935, and also at the time of the passage of said Local Law No. 30 of the City of New York for the year 1935, upwards of ten thousand taxicabs were licensed and operated and still are licensed and operating in the City of New York for the [fol. 25] transportation of persons for hire on, along and through the streets of the City of New York. The operation of the said taxicabs is not and never has been subject to the supervision of either division of the Department of Public Service.

Thirty-sixth. Plaintiff is subjected to and has no protection against competition against it by taxicabs which, though they usually charge higher rates of fare than the plaintiff, nevertheless deprive the plaintiff of considerable revenue which it would receive were taxicabs not operating and carrying passengers for hire through the streets of the City of New York.

Thirty-seventh. Neither said Local Law No. 21 of the City of New York for the year 1934, as amended by Local Law No. 2 of the City of New York for the year 1935, nor said Local Law No. 30 of the City of New York for the year 1935 purports to impose any tax on operators of taxicabs for the privilege of doing business in the City of New York, and instead of being required to pay a tax of three per centum on their gross income under either of said Local Laws, they are required to pay a tax of only one-tenth of one per centum on their gross income in excess of \$15,000 for the privilege of conducting such business, they being subject to Local Law No. 17 of the City of New York for the year 1934, and Local Law No. 32 of the City of New York for the year 1935.

Thirty-eighth. The aforesaid taxes, both those purported to be imposed by Local Law No. 21 for the year 1934, and said Local Law, as amended, and those purported to be [fol. 26] imposed by Local Law No. 30 for the year 1935, as well as those purported to be imposed by Local Law No. 17 for the year 1934, and Local Law No. 32 for the year 1935, are all emergency taxes imposed by the City of New York under authority of said Chapter 873 of the Laws of 1934, or said Chapter 601 of the Laws of 1934, and all of

the said taxes are or were imposed for the purpose of defraying the expenses of unemployment and home relief in the City of New York, which, on information and belief, is not a local but a state purpose.

Thirty-ninth. Although the unemployment emergency in New York City is a matter of state concern for the relief of which the state legislature could have enacted laws imposing state wide taxation, the said legislature, by authorizing a city of over one million inhabitants (the only such city being the City of New York) to impose any taxes which the state legislature could have imposed, but limiting the power so as to prevent such city from taxing any property located or any business conducted or transacted outside the City of New York, did, in effect, through the City of New York as its delegated agent, impose taxes for a state purpose on utilities doing business in one part of the state without imposing any taxes on utilities doing similar business in other parts of the state.

Fortieth. The operating and maintenance expenses of railroad corporations (including the plaintiff) engaged in the operation of subway, elevated and/or street surface railroads in the City of New York are far higher in proportion to gross receipts than the operating and maintenance expenses of corporations engaged in other types of [fol. 27] business but included within the same class purported to be taxed by the provisions of said Local Laws No. 21 of 1934, No. 2 of 1935 and No. 30 of 1935. The ratio of net income to gross receipts is far higher in the case of corporations within the said class which are engaged in selling gas, electricity, refrigeration, steam, water, telephone service and/or telegraph service than in the case of the plaintiff or any other railroad corporation which is included within the said class purported to be taxed by said local laws.

The net income for the calendar year 1935 of Brooklyn Edison Company, a corporation subject to the supervision of one of the divisions of the Department of Public Service and engaged in the business of selling electricity in the City of New York was, before deduction of taxes, approximately 42% of its gross receipts for the said calendar year.

The net income of the plaintiff for the calendar year 1935, before deduction of taxes, was approximately 19% of its gross receipts for the said calendar year.

The net income for the calendar year 1935 of Brooklyn and Queens Transit Corporation, a corporation subject to the jurisdiction of one of the divisions of the Department of Public Service and engaged in the business of operating street surface railroads in the City of New York was, before deduction of taxes, approximately 14½% of its gross receipts for the said calendar year.

Other street railroad corporations subject to the supervision of one of the divisions of the Department of Public Service and operating street railroads within the City of New York, while having substantial gross receipts from [fol. 28] the conduct of their business during the year 1935, suffered a net loss for the said year and had no net income out of which to pay the said taxes purported to be imposed upon them by said Local Law No. 21 of 1934, as amended, so that the payment of said taxes under said local law simply added to their deficits.

Forty-first. By reason of the facts stated in the preceding paragraph of this complaint, a tax of 3% of gross receipts imposed upon all corporations subject to the supervision of either division of the Department of Public Service is so far more burdensome upon some corporations within the taxed class than upon others as to make the distribution of the tax burden glaringly unequal within the class itself. The imposition of the tax is a plainly arbitrary method of collecting money for unemployment relief purposes in the easiest way without any thought of or attempt at equal distribution of the tax burden in proportion to benefits or to capacity to pay on the part of the respective persons and corporations taxed, or to the value of the privilege taxed.

Forty-second. The payments exacted from the plaintiff by the defendant under said Local Laws No. 21 of 1934, No. 2 of 1935, and No. 30 of 1935, and made under protest by the plaintiff for the calendar year 1935 and the first six months of 1936, as set forth in paragraph Twenty-third of this complaint, had the effect of depriving the plaintiff during the said calendar year 1935 and the first six months of 1936 of a substantial part of the interest and sinking fund allowances accruing during said period and to which it was entitled under Subdivisions 7 and 8 of Article XLIX [fol. 29] of Chapter II of the lease constituting Part Third of said Contract No. 4, the revenues from the railroads

operated under said contract and lease during the said period from January 1, 1935, to June 30, 1936, after deducting the said payments made to the defendant as set forth in paragraph Twenty-third of this complaint, being approximately \$635,292.33 less than enough to pay the said interest and sinking fund charges accruing during the said period. Had it not been for the said payments of taxes under said Local Laws the revenue from the said railroads covered by said Contract No. 4 would have been \$773,404.67 more than enough to pay all sums accruing during said period to the plaintiff as Lessee, under said Article XLIX of said Contract No. 4.

Forty-third. At the time when said Contract No. 4 was made the City of New York had no power to make or adopt laws taxing any corporation for the privilege of holding property, exercising its franchises or doing business within the City of New York, and it was not within the contemplation of either of the parties to the said contract that the City of New York ever would or should have the power to make or adopt such laws or the power to tax the Lessee under said contract for the "privilege" of carrying out and fulfilling its obligations under the said contract.

Forty-fourth. All of the terms and provisions of said Contract No. 4 are in accordance with the requirements of the Rapid Transit Act, Chapter 4 of the Laws of 1891, as amended, and the said contract was made under and pursuant to the authority and in accordance with the terms [fol. 30] dictated by the State Legislature in said Rapid Transit Act. Said Rapid Transit Act provides that any rental and moneys payable to the City of New York under such contract out of the earnings of the railroads operated under such contract "shall be applied first to the payment of the interest upon bonds issued by said City for the construction and equipment of said road as hereinafter provided for as the same shall accrue and fall due, and the remainder of said rental and moneys not required for the payment of said interest shall be kept separate and apart from any and all other moneys of such City and shall be securely invested and, with the annual accretions of interest thereon, shall constitute a sinking fund"

Forty-fifth. The collection by the defendant from the plaintiff of the payments set forth in paragraph Twenty-third of this complaint was in violation of the provisions

and intent of said Contract No. 4 and in violation of and inconsistent with the said Rapid Transit Act, not only because it deprived the plaintiff of interest and sinking fund allowances which it was provided and intended by said Contract No. 4 that the plaintiff, as Lessee, should receive out of the gross receipts from the railroads operated under and pursuant to said contract before the defendant should receive any part of such gross receipts, but also because it diverted into a fund which can be used only for unemployment relief purposes, moneys which, under and pursuant to the provisions of the Rapid Transit Act, should have been applied, to the extent that they may have been payable to the defendant out of the earnings of the said railroads, to the payment of interest on the bonds issued by the City [fol. 31] for the construction of the railroads leased to the Lessee under said Contract No. 4.

Forty-sixth. The so-called taxes, imposed upon the plaintiff by said Local Laws No. 21 of 1934, No. 2 of 1935, and No. 30 of 1935, and which the plaintiff paid under protest, as aforesaid, resulted not only in the impairment of said Contract No. 4 and the destruction of the benefits enuring to the plaintiff under said contract, but resulted also in confiscation of plaintiff's property preventing the plaintiff from receiving a fair return on the value of its property devoted to public use under and pursuant to said contract.

Forty-seventh. Each and all of said taxes purported to be imposed by said Local Law No. 21 for the year 1934, as amended, and by said Local Law No. 30 for the year 1935, were illegally imposed, illegally collected and illegally received by the City of New York in that said Local Law No. 21 for the year 1934 (both in its original form and as amended by Local Law No. 2 for the year 1935) and said Local Law No. 30 for the year 1935, and Chapter 873 of the Laws of 1934 and Chapter 601 of the Laws of 1935, under and pursuant to which said local laws, respectively, were purported to be enacted, are and each of them is illegal, unconstitutional, null and void, being in violation of Section 10 of Article I of the Constitution of the United States and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and Section C of Article I of the Constitution of the State of New York, for the following reasons, among others:

1. They impair the obligation of Contract No. 4 hereinabove mentioned, between the defendant and the plaintiff [fol. 32] as Lessee under said contract, in that they purport to require payments to the defendant out of the gross receipts from the operation of the railroad covered by said contract, which payments were not contemplated at the time said contract was made, nor provided for therein, and which payments deprive the plaintiff of the benefits of said contract, making it impossible for the plaintiff to obtain for itself out of the revenues derived from the operation of the said railroad under said contract the sums of money which by said contract it was provided that the plaintiff should receive for itself before the City should be entitled to any part of the income from said railroads.

2. They deprive the plaintiff and others of property without due process of law in that

(a) They make it impossible for the plaintiff to derive enough income from the operation of the railroads covered by said contract to pay a fair return upon the capital invested by the plaintiff in the railroads and equipment thereof covered by said contract and make it impossible for the plaintiff to earn even the amounts which by said contract the defendant conceded it to be fair and reasonable that the plaintiff should receive as fixed charges before the defendant itself should receive any part of the revenues from the said railroads to cover interest on its investment therein and before there should be any division of profits between the plaintiff and the defendant.

[fol. 33] (b) Under the guise of purporting to impose taxes they provide for the exaction of money from a small group or class of persons and corporations for the benefit of another group or class of individuals, the exaction being neither what can properly be called a tax nor a part of any plan of regulation in which both groups are interested. The exaction is not a tax because it is not an exaction for the support of the government and because it is specifically provided by the said laws that the money collected by means of the exaction shall not go into the general fund of the City or State of New York but shall be put into a special bank account or bank accounts and be used for no other purpose than the relief of those who suffer because of unemployment.

(c) The taxes purported to be imposed thereby are measured by a percentage of gross income without regard to the net income of or the ruinous effect upon the persons and corporations purported to be taxed.

(d) The persons and corporations purported to be taxed receive no benefits proportionate to the amounts of taxes they are required to pay under said local laws and are required by said local laws to pay the shares of others in the expense of a project which is of equal concern to all and which benefits the persons and corporations so taxed no more, in proportion to wealth, property or income, than any other person or corporation doing business in the City of New York.

[fol. 34] 3. They deny to the plaintiff and other corporations the equal protection of the law in that

(a) Though being no part of any general or permanent plan of taxation, and though purporting to impose only emergency taxes for the purpose of unemployment relief, they arbitrarily single out one small group of persons and corporations and purport to tax them upon the privilege of holding property, doing business or exercising their franchises within the City of New York at a rate which is three thousand per cent. higher than the rate of tax imposed for the same purpose upon other persons and corporations for the privilege of holding property, doing business or exercising their franchises within the City of New York, thereby arbitrarily and with hostile design placing a ruinous burden upon a special small group of persons and corporations in an attempt to make them pay far more than their fair share of the cost of the emergency relief, there being no sound or reasonable basis for the great discrimination against them.

(b) They purport to impose excise taxes on certain persons and corporations engaged in the transportation of passengers for hire within the City of New York without imposing similar taxes on other persons and corporations engaged in the transportation of passengers for hire and using the streets of the said City for the conduct of their business.

[fol. 35] (c) Although the taxes purported to be imposed thereby are for a state purpose, they do not affect all persons and corporations in the same class throughout the state, but affect only persons and corporations engaged in

business or holding property within the City of New York without affecting persons and corporations engaged in the same character of business or holding the same kind of property in any other part of the state outside the City of New York.

(d) The definition of the word "utility" contained in said Local Laws, which definition describes and determines the class of persons and corporations affected by the said laws, is such as to make the classification unreasonable and void, because, except as to the businesses of furnishing or selling gas, electricity, steam, water, refrigeration, telephone service and/or telegraph service, the character of the business in which any person or corporation may be engaged is not made the test of whether or not such person or corporation is within the class taxable under said laws, but the sole test thereof is whether or not such person or corporation is subject to the supervision of either Division of the Department of Public Service regardless of the character of his or its business. This results in bringing within the class purported to be taxed under the said laws, many persons and corporations, including plaintiff, the taxing of whom at the same rate and on the same basis as the taxing of [fol. 36] persons and corporations engaged in the business of selling gas, electricity, steam, water, refrigeration, telephone service and/or telegraph service, and at a rate thirty times as high as the rate at which other persons and corporations are taxed, is entirely unreasonable and unjustifiable.

(e) Even if it be reasonable to differentiate between utility corporations engaged in the business of selling gas, electricity, steam, water, refrigeration, telephone service and/or telegraph service and corporations engaged in other lines of business, and to tax such utility corporations at a far higher rate than other corporations for the privilege of exercising their franchises, or of holding property or of doing business in the City of New York, there is no reasonable basis for so differentiating between the plaintiff and corporations which are not utilities, and it is wholly unreasonable to include the plaintiff in the same class, for the purpose of taxation, with utility corporations engaged in the business of selling gas, electricity, steam, water, refrigeration, telephone service or telegraph service because such utility corporations meet with little or no competition

and at the same time can protect themselves from the ruination which might otherwise result from excessive taxation by obtaining higher rates for the utility service furnished by them if, in view of the taxes they are required to pay, the present rates fixed by the Public Service Commission [fol. 37] prove to be confiscatory, whereas the plaintiff meets with substantial competition in the operation of new underground railroads by the City of New York, the taxing agent, itself, and in the operation of taxicabs, and, being engaged exclusively in the operation of railroads under a lease agreement with the defendant which limits the rate of fare which the plaintiff can charge to five cents per passenger, is helpless to obtain any increase in the rate of fare which it may charge its passengers and has no way of defending itself against confiscation and ruination resulting from excessive taxation.

(f) The said local laws purport to impose a tax measured by a percentage of gross receipts upon a class defined in such a way as to include corporations the respective businesses of which are so essentially different in character that the ratio of net income to gross receipts in the case of one is radically less than in the case of another, the result of which is that said local laws produce glaring inequity in the distribution of the tax burden within the taxed class itself, arbitrarily discriminating in favor of some and against other members of the class, and taxing some far more heavily than others on the value of the privilege taxed.

Forty-eighth. The defendant had no power or authority to enact the said Local Laws No. 21 of 1934, No. 2 of 1935, [fol. 38] and No. 30 of 1935, and the same are null and void in so far as they purport to impose excise taxes upon the plaintiff in this action. Neither Chapter 873 of the Laws of 1934, nor Chapter 601 of the Laws of 1935, specifically empowers or shows any clear intent on the part of the State Legislature to empower the defendant to impose an excise tax, for the privilege of doing business, upon a corporation, the sole business of which is the performance and fulfillment of a pre-existing contract with the defendant itself made pursuant to and in accordance with authority granted and terms and conditions dictated by the State Legislature in the Rapid Transit Act, Chapter 4 of the Laws of 1891, as amended, and it is so unreasonable and also so inconsistent with the said Rapid Transit Act that the defendant

should be allowed to impose an excise tax upon the plaintiff for the "privilege" of fulfilling its obligations under Contract No. 4, hereinabove mentioned, and by such tax, to defeat the intent of both the contract and the said Rapid Transit Act itself, that nothing short of legislation showing clear intent on the part of the State Legislature to grant the defendant power to impose such a tax upon the plaintiff can be deemed to confer any such power or authority upon the defendant and it must be presumed that the general powers of taxation granted to the defendant by Chapter 873 of the Laws of 1934 and Chapter 601 of the Laws of 1935, did not include the power to impose upon and collect from the plaintiff any such tax as is purported to be imposed upon it by said Local Laws No. 21 of 1934, No. 2 of 1935 and No. 30 of 1935.

It is also unfair, unreasonable and contrary to good public policy that a city should be allowed to impose an excise [fol. 39] tax upon a railroad corporation against which the city itself directly competes in the business of carrying passengers for hire, particularly where the income from the railroads operated by the city in competition with the railroads operated by said railroad corporation is not subject to the same tax as is the income from the latter. No authority to destroy or handicap its competitor by taxation to which its own competing business is not subjected, can be deemed to have been granted to the city by the State Legislature under any general grant of powers of taxation and without a clear intent to grant such authority.

Forty-ninth. By reason of all the foregoing, the exactions by the defendant from the plaintiff of the payments heretofore made under protest by the plaintiff as set forth in paragraph Twenty-third of this complaint were illegal, void and without authority.

Fiftieth. All of the said moneys paid over by the plaintiff to the defendant as set forth in paragraph Twenty-third of this complaint, amounting to a total of \$1,408,697, are the property of and belong to the plaintiff and constitute moneys had and received by the City of New York belonging to and for the benefit of the plaintiff.

Fifty-first. The said sum of \$1,408,697 paid by the plaintiff to the defendant as aforesaid was received by the de-

fendant, has been and still is retained by it and the defendant has refused and still refuses to repay the same or any [fol. 40] part thereof to the plaintiff although the plaintiff has duly demanded such repayment.

Fifty-second. On or about the 13th day of August, 1936, plaintiff duly presented its written demand and claim upon which this action is founded to the Comptroller of the City of New York for adjustment and more than thirty days have elapsed since said demand and claim upon which this action is founded were presented to said Comptroller for adjustment and he has neglected and refused to make adjustment or payment thereof for thirty days after such presentment.

Fifty-third. There is now due and owing from the defendant to the plaintiff the sum of \$1,408,697, with interest thereon from the respective dates on which the payments totalling said \$1,408,697 were made, as set forth in paragraph Twenty-third of this complaint.

Wherefore, plaintiff demands judgment against the defendant for the sum of \$1,408,697, with interest thereon as follows:

- On \$81,266.39 from February 28, 1935,
- On \$75,657.19 from March 25, 1935,
- On \$83,151.75 from April 25, 1935,
- On \$81,033.97 from May 25, 1935,
- On \$82,792.85 from June 25, 1935,
- On \$74,758.37 from July 25, 1935,
- On \$74,001.88 from August 24, 1935,
- On \$73,174.61 from September 25, 1935,
- On \$73,489.59 from October 25, 1935,
- On \$80,547.44 from November 25, 1935,
- On \$75,949.31 from December 24, 1935,
- [fol. 41] On \$79,264.51 from January 25, 1936,
- On \$78,843.10 from February 25, 1936,
- On \$76,451.68 from March 25, 1936,
- On \$81,967.90 from April 25, 1936,
- On \$77,927.02 from May 25, 1936,
- On \$82,941.00 from June 25, 1936,
- On \$75,478.44 from July 25, 1936,

together with the costs and disbursements of this action.
 George D. Yeomans, Attorney for Plaintiff, Office and
 P. O. Address, 385 Flatbush Avenue Extension,
 Brooklyn, New York.

(Sworn to by W. S. Menden, President of the New York
 Rapid Transit Corporation, on October 9, 1936.)

[fol. 42] EXHIBIT "A" ANNEXED TO AMENDED COMPLAINT
 (CHAPTER 873 OF THE LAWS OF 1934)

AN ACT to enable, temporarily, any city of the state having
 a population of one million inhabitants or more to adopt
 and amend local laws, imposing in any such city any
 tax and/or taxes which the legislature has or would have
 power and authority to impose to relieve the people of
 any such city from the hardships and suffering caused by
 unemployment and to limit the application of such local
 laws.

Became a law August 18, 1934, with the approval of the
 Governor. Passed, on emergency message, by a two-
 thirds vote.

The People of the State of New York, represented in
 Senate and Assembly, do enact as follows:

Section 1. Notwithstanding any other provision of law
 to the contrary, any city of the state having a population
 of one million inhabitants or more acting through its local
 legislative body, is hereby authorized and empowered until
 December thirty-first, nineteen hundred thirty-five to adopt
 and amend local laws imposing in any such city any tax
 and/or taxes which the legislature has or would have power
 and authority to impose to relieve the people of any such
 city from the hardships and suffering caused by unemploy-
 ment and make provision for the collection thereof by the
 chief fiscal officer of any such city. The tax or taxes im-
 posed pursuant to such local laws shall be effective only
 during the period commencing when this act becomes effec-
 tive and ending December thirty-first, nineteen hundred
 thirty-five, or any portion of such period. A tax imposed
 hereunder shall have application only within the territorial

[fol. 43] limits of any such city and shall be in addition to any and all other taxes.

This act shall not authorize the imposition of a tax on any transaction originating and/or consummated outside of the territorial limits of any such city, notwithstanding that some act be necessarily performed with respect to such transaction within such limits.

This act shall not authorize the imposition of a tax on a non-resident of such city or on account of any transaction by or with a non-resident of such city, except when imposed without discrimination as between residents and non-residents, on account of tangible property actually located or income earned, or trades, businesses or professions carried on within such city, or on account of transfers, retail sales or other transactions actually made or consummated within such city by a non-resident while within such city. A corporation shall not be deemed a non-resident by reason of the fact its principal place of business is not within the city.

A person who has a permanent place of abode without such city and lives more than seven months of the year out of such city shall be deemed a non-resident within the meaning of this act.

Provided, however, that nothing herein contained shall limit or prevent the imposition of a tax on gross income or a tax on gross receipts of persons, firms and corporations doing business in any such city. No such person, firm or corporation, however, shall be subject to the imposition of more than one tax by any such city on gross income or gross receipts under the provisions of this act.

§ 2. Revenues resulting from the imposition of taxes authorized by this act shall be paid into the treasury of any [fol. 44] such city and shall not be credited or deposited in the general fund of any such city, but shall be deposited in a separate bank account or accounts and shall be available and used solely and exclusively for the relief purposes for which the said taxes have been imposed under the provisions of this act.

Such legislative body may authorize the performance of public work for the relief purposes aforesaid to be paid for out of the tax or taxes, imposed under this act, and which may be undertaken other than by contract by such municipal corporation, during the period aforesaid, through and under its local emergency work bureau or by its public welfare or

other department under the supervision and control of its local emergency work bureau. These provisions shall be effective notwithstanding any provisions contained in any charter, or in any general, special or local laws to the contrary and notwithstanding any such provisions therein contained requiring such work as may be undertaken to be let by contract.

§ 3. This act shall take effect immediately.

[fol. 45] EXHIBIT "B" ANNEXED TO AMENDED COMPLAINT
(CHAPTER 601 OF THE LAWS OF 1935)

AN ACT to amend chapter eight hundred and seventy-three of the laws of nineteen hundred thirty-four, entitled "An Act to enable, temporarily, any city of the state having a population of one million inhabitants or more to adopt and amend local laws, imposing in any such city any tax and/or taxes which the legislature has or would have power and authority to impose to relieve the people of any such city from the hardships and suffering caused by unemployment and to limit the application of such local laws," in relation to extending until July first, nineteen hundred thirty-six the time within which the power conferred by such act may be exercised and excepting from such power the right to impose taxes on incomes or upon the transfers of estates of deceased persons

Became a law April 29, 1935, with the approval of the Governor. Passed, by a two-thirds vote, on emergency message and message of necessity.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Sections one and two of chapter eight hundred and seventy-three of the laws of nineteen hundred thirty-four, entitled "An act to enable, temporarily, any city of the state having a population of one million inhabitants or more to adopt and amend local laws, imposing in any such city any tax and/or taxes which the legislature has or would have power and authority to impose to relieve the people of any such city from the hardships and suffering caused by unem-

[fol. 46] ployment and to limit the application of such local laws" are hereby amended to read as follows:

§ 1. Notwithstanding any other provision of law to the contrary, any city of the state having a population of one million inhabitants or more acting through its local legislative body, is hereby authorized and empowered until July first, nineteen hundred thirty-six to adopt and amend local laws imposing in any such city any tax and/or taxes which the legislature has or would have power and authority to impose to relieve the people of any such city from the hardships and suffering caused by unemployment and make provision for the collection thereof by the chief fiscal officer of any such city. The tax or taxes imposed pursuant to such local laws shall be effective only during the period commencing when this act becomes effective and ending July first, nineteen hundred thirty-six, or any portion of such period. A tax imposed hereunder shall have application only within the territorial limits of any such city and shall be in addition to any and all other taxes.

This act shall not authorize the imposition of a tax on incomes or upon the transfers of estates of deceased persons.

This act shall not authorize the imposition of a tax on any transaction originating and/or consummated outside of the territorial limits of any such city, notwithstanding that some act be necessarily performed with respect to such transaction within such limits.

This act shall not authorize the imposition of a tax on a non-resident of such city or on account of any transaction by or with a non-resident of such city; except when imposed [fol. 47] without discrimination as between residents and non-residents, on account of tangible property actually located or income earned, or trades, businesses or professions carried on within such city, or on account of transfers, retail sales or other transactions actually made or consummated within such city by a non-resident while within such city. A corporation shall not be deemed a non-resident by reason of the fact its principal place of business is not within the city.

A person who has a permanent place of abode without such city and lives more than seven months of the year out of such city shall be deemed a non-resident within the meaning of this act.

Provided, however, that nothing herein contained shall limit or prevent the imposition of a tax on gross incomes or a tax on gross receipts of persons, firms and corporations doing business in any such city. No such person, firm or corporation, however, shall be subject to the imposition of more than one tax by any such city on gross income or gross receipts under the provisions of this act.

§ 2. Revenues resulting from the imposition of taxes authorized by this act shall be paid into the treasury of any such city and shall not be credited or deposited in the general fund of any such city, but shall be deposited in a separate bank account or accounts and shall be available and used solely and exclusively for paying the principal amount of any installment of principal and of interest due during the aforesaid period on account of the ten-year serial bonds sold to obtain moneys to pay for home relief and work relief in any such city in the month of November, nineteen [fol. 48] hundred thirty-three, and for the relief purposes for which the said taxes have been imposed under the provisions of this act.

Such legislative body may authorize the performance of public work for the relief purposes aforesaid to be paid for out of the tax or taxes, imposed under this act, and which may be undertaken other than by contract by such municipal corporation, during the period aforesaid, through and under its local emergency work bureau or by its public welfare or other department under the supervision and control of its local emergency work bureau. These provisions shall be effective notwithstanding any provisions contained in any charter, or in any general, special or local laws to the contrary and notwithstanding any such provisions therein contained requiring such work as may be undertaken to be let by contract.

§ 3. This act shall take effect immediately.

[fol. 49] EXHIBIT "C" ANNEXED TO AMENDED COMPLAINT
(LOCAL LAW NO. 21 OF 1934 AS AMENDED BY LOCAL LAW NO.
2 OF 1935)

A Local Law to relieve the people of the city of New York from the hardships and suffering caused by unemployment and the effects thereof on the public health and welfare, by imposing an excise tax on the gross income of every person doing business within such city and subject to supervision of either division of the department of public service, and of any and all other utilities doing business within such city to enable such city to defray the cost of granting unemployment, work and home relief.

Be it enacted by the Municipal Assembly of the City of New York as follows:

§ 1

Definitions.—When used in this local law:

(a) The word "person" or the plural thereof, includes and shall be deemed to refer to and mean corporations, companies, associations, joint stock associations, copartnerships, *estates, assignees of rents, any person acting in a fiduciary capacity* and/or persons, their *assignees, lessees, trustees or receivers appointed by any court whatsoever, or by any other means.*

(b) The word "comptroller" shall be deemed to refer to and mean the comptroller of the city of New York.

(c) The words "gross income" shall be deemed to refer to and include receipts received in or by reason of any sale made (except the sale of real property) or service rendered [fol. 50] in the city of New York, including cash, credits and property of any kind or nature (whether or not such sale is made or such service is rendered for profit) without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or services or other costs, interest or discount paid, or any other expense whatsoever; also profits from the sale of securities; also profits from the sale of real property growing out of the ownership or use of or interest in such property; also profit from the sale of personal property (other than property of a kind

which would properly be included in the inventory of the taxpayer if on hand at the close of the period for which a return is made); also receipts from interest, dividends, [rents] and royalties without any deductions therefrom for any expenses whatsoever incurred in connection with the receipt thereof, and also gains or profits from any source whatsoever.

(d) *The words "gross operating income" shall be deemed to refer to and include receipts received in or by reason of any sale made or service rendered, of the property and services specified in subdivision (e) of this section, in the city of New York, including cash, credits and property of any kind or nature, without any deduction therefrom on account of the cost of the property sold, the cost of the materials used, labor or services or other costs, interest or discount paid, or any other expenses whatsoever.*

[d] (e) The word "utility" shall be deemed to refer to and mean any person subject to the supervision of either division of the department of public service and every person *whether or not such person is subject to such supervision* [fol. 51] who shall engage in the business of furnishing or selling to other persons, gas, [electric], *electricity*, steam, water, *refrigeration, telephony, and/or telegraphy*, or who shall engage in the business of furnishing or selling to other persons, *gas, electric, steam, water, refrigeration*, telephone or telegraph service [whether or not such person is subject to supervision by the department of public service.]

(f) *The word "return" includes any amended return filed or required to be filed as herein provided.*

§ 2

Imposition of Excise Tax.—Notwithstanding any other provision of law to the contrary, for the privilege of exercising its franchise or franchises, or of holding property, or of doing business in the city of New York, during the calendar year nineteen hundred thirty-five or any part thereof, every utility doing business in the city of New York and subject to the supervision of either division of the department of public service, shall pay to the comptroller of the city of New York an excise tax which shall be equal to three per centum of its gross income for the calendar year nineteen hundred and thirty-five and every other utility do-

ing business in the city of New York shall pay to the comptroller of the city of New York an excise tax which shall be equal to three percentum of its gross operating income for the calendar year nineteen hundred thirty-five. Such tax shall be in addition to any and all other taxes and fees imposed by any other provision of law and shall be paid at the time and in the manner hereinafter provided, but any utility subject to tax hereunder shall not be liable to any tax under Local Law No. 17 of the local laws of the city of New York [fol. 52] for the year 1934 [...] with respect to its gross income or gross operating income as the case may be.

For the purpose of proper administration of this local law and to prevent evasion of the tax hereby imposed, it shall be presumed that the gross revenues *or income* of any such utility are derived from business conducted wholly within the territorial limits of the city of New York until the contrary is established, and the burden of proving that any part of its gross revenues *or income* is not so derived shall be upon such utility.

§ 3

Records to Be Kept.—Every utility subject to tax hereunder shall keep such records of its business and in such form as the comptroller may by regulation require. Such records shall be offered for inspection and examination at any time upon demand by the comptroller or his duly authorized agent or employee and shall be preserved for a period of three years, except that the comptroller may consent to their destruction within that period or may require that they be kept longer.

§ 4

Returns: Requirements as to.—On or before the twenty-fifth day of February, nineteen hundred and thirty-five, and on or before the twenty-fifth day of every month thereafter until the twenty-fifth day of January, nineteen hundred and thirty-six, every utility subject to tax hereunder shall file a return with the comptroller on a form to be furnished by the comptroller. Such return shall state the gross income *or gross operating income as the case may be* for the preceded- [fol. 53] ing calendar month and shall contain any other data, information or matter which the comptroller may require to be included therein. The comptroller may require

at any further time a supplemental return hereunder, which shall contain any data upon such matters as the comptroller may specify.

Every return required hereunder shall have annexed thereto an affidavit of the head of every such business making the same, or of the owner or of a copartner thereof, or of the principal officer of the corporation if such business be conducted by a corporation, to the effect that the statements contained therein are true.

The comptroller may require amended returns to be filed within twenty days after notice and to contain the information specified in the notice.

§ 5

Payment of Tax.—At the time of filing a return, as provided under section four hereof, each utility shall pay to the comptroller such portion of the tax imposed by this local law as is equal to three per centum of its gross income or *gross operating income as the case may be* for the period covered by such return. Such portion of the tax shall be due and payable on the last day on which the return for such period is required to be filed, regardless of whether a return is filed or whether the return which is filed correctly indicates the amount of tax due.

§ 6

Determination of Tax by Comptroller.—In case the return required by section four hereof shall be insufficient or unsatisfactory to the comptroller, or if such return is not made [fol. 54] as required, and if the maker fails to file a corrected or sufficient return within twenty days after the same is required by notice from the comptroller, the comptroller shall determine the amount of tax due from such information as he is able to obtain, and if necessary, may estimate the tax on the basis of external indices. The comptroller shall give notice of such determination to the person liable for such tax. Such determination shall finally and irrevocably fix such tax unless the person against whom it is assessed shall within thirty days after the giving of notice of such determination apply to the comptroller for a hearing or unless the comptroller of his own motion shall reduce the same. After such hearing the comptroller shall give notice of his decision to the person liable for the tax. The determination of

the comptroller may be reviewed by certiorari if application therefor is made within thirty days after the giving of notice of such determination.

An order of certiorari shall not be granted unless the amount of any tax sought to be reviewed, with penalties thereon, if any, shall be first deposited with the comptroller and an undertaking filed with the comptroller in such amount and with such sureties as a justice of the supreme court shall approve, to the effect that if such order be dismissed or the tax confirmed the applicant for the writ will pay all costs and charges which may accrue in the prosecution of the certiorari proceeding.

§ 7

Proceedings to Recover Tax.—Whenever any person shall fail to pay any tax or part thereof or penalty imposed by this [fol. 55] local law as in this local law provided, the corporation counsel of the city of New York shall, upon the request of the comptroller, bring an action in the name of the city of New York to enforce payment of the same.

As an additional or alternate remedy, the comptroller may issue a warrant, directed to the sheriff of any county within the city of New York, commanding him to levy upon and sell the real and personal property of the person from whom the tax is due, which may be found within his county, for the payment of the amount thereof, with any penalties, and the cost of executing the warrant, and to return such warrant to the comptroller and to pay to him the money collected by virtue thereof within sixty days after the receipt of such warrant. The sheriff shall within five days after the receipt of the warrant file with the clerk of his county a copy thereof, and thereupon such clerk shall enter in the judgment docket the name of the person mentioned in the warrant and the amount of the tax and penalties for which the warrant is issued and the date when such copy is filed. Thereupon the amount of such warrant so docketed shall become a lien upon the title to and interest in real property and chattels real of the person against whom the warrant is issued in the same manner as a judgment duly docketed in the office of such clerk. The sheriff shall then proceed upon the warrant in the same manner, and with like effect, as that provided by law in respect to executions issued against property upon judgments of a court of record, and for his services in exe-

cuting the warrant he shall be entitled to the same fees, which he may collect in the same manner.

[fol. 56] In the discretion of the comptroller, a warrant of like terms, force and effect may be issued and directed to any officer or employee of the department of finance of the city of New York and in the execution thereof such officer or employee shall have all the powers conferred by law upon sheriffs, but he shall be entitled to no fee or compensation in excess of the actual expenses paid in the performance of such duty. If a warrant is returned not satisfied in full, the comptroller may from time to time issue new warrants and shall also have the same remedies to enforce the amount due thereunder as if the city of New York had recovered judgment therefor and execution thereon had been returned unsatisfied.

§ 8

Notices and Limitation of Time.—Any notice authorized or required under the provisions of this local law may be given by mailing the same to the person for whom it is intended in a post-paid envelope addressed to such person at the address given in any return filed by him pursuant to the provisions of this local law or if no return has been filed then to such address as may be obtainable. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this local law by the giving of notice shall commence to run from the date of mailing of such notice.

The provisions of the civil practice act relative to the limitation of time for the enforcement of a civil remedy shall not apply to any proceeding or action taken to levy, appraise, assess, determine or enforce the collection of any tax or penalty provided by this local law.

[fol. 57]

§ 9

Penalties.—Any person failing to file a return or corrected return, or to pay any tax or any portion thereof within the time required by this local law shall be subject to a penalty of five per centum of the amount of tax due, plus one per centum of such tax for each month of delay or fraction thereof excepting the first month after such return was required to be filed or such tax became due; but the comptroller, if satisfied that the delay was excusable, may remit

all or any part of such penalty. Such penalty shall be paid to the comptroller and disposed of in the same manner as other receipts under this local law. Unpaid penalties may be enforced in the same manner as the tax imposed by this local law.

Any person and any officer of a corporation or copartner filing or causing to be filed any return, certificate, affidavit or statement required or authorized by this local law which is willfully false and any person who shall fail to file a return as required under this local law, and the officers of any corporation which shall so fail, shall be guilty of a misdemeanor, punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment.

The certificate of the comptroller to the effect that a tax has not been paid, that a return has not been filed, or that information has not been supplied pursuant to the provisions of this local law shall be prima facie evidence thereof.

[fol. 58]

§ 10

Refunds.—If within one year from the payment of any tax or penalty the payer thereof shall make application for a refund thereof and the comptroller or the court shall determine that such tax or penalty, or any portion thereof was erroneously or illegally collected, the comptroller shall refund the amount so determined. For like cause and within the same period a refund may be so made on the initiative of the comptroller. Whenever a refund is made the comptroller shall state his reasons therefor in writing. However, no refund shall be made of a tax or penalty paid pursuant to a determination of the comptroller as provided in section six of this local law unless the comptroller after a hearing as in said section provided or of his own motion, shall have reduced the tax or penalty or it shall have been established in a certiorari proceeding that such determination was erroneous or illegal, in which event a refund shall be made as above provided upon the determination of such proceeding.

An application for a refund made as herein provided shall be deemed an application for a revision of any tax or penalty complained of and the comptroller may receive additional evidence with respect thereto. After making his determination the comptroller shall give notice thereof to the person

interested and he shall be entitled to a certiorari order to review such determination, subject to the provision of section six in respect thereto.

[fol. 59]

§ 11.

General Powers of Comptroller.—In the administration of this local law the comptroller shall:

First. Make such reasonable rules and regulations, not inconsistent with law, as may be necessary for the exercise of his powers and the performance of his duties under this local law, and prescribe the form of blanks, reports and other records relating to the administration and enforcement of this local law.

Second. Assess, determine, revise, readjust and impose the taxes authorized to be imposed under this local law.

Third. Take testimony and proofs, under oath, with reference to any matter within the line of his official duty under this local law or he may designate and duly authorize an employee to act in his place for that purpose.

Fourth. To request information from the tax commission of the State of New York or the United States collector of internal revenue relative to any person, and to afford information to such tax commission or such collector of internal revenue relative to any person, any other provision in this local law to the contrary notwithstanding.

§ 12

Administration of Oaths and Compelling Testimony.—The comptroller or his employee duly designated and authorized by the comptroller shall have power to administer oaths and take affidavits in relation to any matter or proceeding in the exercise of the powers and duties of the comptroller under this local law. The comptroller shall have power to subpoena and require the attendance of witnesses and the production of books, papers and documents pertinent to the investigations and inquiries which he is authorized to conduct under this local law, and to examine them in relation to any matter which he has power to investigate hereunder and to issue commissions for the examination of witnesses who are out of the state or unable to attend before him or excused from attendance.

A justice of the supreme court either in court or at chambers shall have power summarily to enforce by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers and documents called for by the subpoena of the comptroller hereunder.

Any person who shall testify falsely in any material matter pending before the comptroller hereunder shall be guilty of a misdemeanor and punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment.

The officers who serve the comptroller's summons or subpoena hereunder and witnesses attending in response thereto shall be entitled to the same fees as are allowed to officers and witnesses in civil cases in courts of record.

§ 13

Returns to be Secret.—Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for the comptroller or any officer or employee of the department of finance to divulge or make known in any [fol. 61] manner, the receipts or any other information relating to the business of a taxpayer contained in any return required under this local law.

The officers charged with the custody of such returns shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court, except on behalf of the city of New York or of the comptroller, or on behalf of any party to any action or proceeding under the provisions of this local law when the returns or fact shown thereby are directly involved in such action or proceeding, in either of which events, the court may require the production of, and may admit in evidence, so much of said returns or of the fact shown thereby, as are pertinent to the action or proceeding and no more.

Nothing herein shall be construed to prohibit the delivery to a taxpayer or his duly authorized representative of a certified copy of any return filed in connection with his tax, nor to prohibit the publication of statistics so classified as to prevent the identification of particular returns and the items thereof or the inspection by the corporation counsel of the city of New York or other legal representatives of such city of the return of any taxpayer who shall bring action or proceeding to set aside or review the tax based thereon, or

against whom an action or proceeding has been instituted or is contemplated for the collection of a tax or penalty. Returns shall be preserved for three years and thereafter until the comptroller orders them to be destroyed.

[fol. 62]

§ 14

Disposition of Revenues.—All revenues and moneys resulting from the imposition of the taxes imposed by this local law shall be paid into the treasury of the city of New York and shall not be credited or deposited in the general fund of the city of New York but shall be deposited in a separate bank account or accounts, and shall be available and used solely and exclusively for the purpose of relieving the people of the city of New York from the hardships and suffering caused by unemployment, including the repayment of moneys borrowed for such purpose.

§ 15

Application: Construction.—If any provision of this local law, or the application thereof to any person or circumstances, is held invalid, the remainder of this local law, and the application of such provisions to other persons or circumstances shall not be affected thereby. This local law shall be construed in conformity with chapter eight hundred and seventy-three, laws of one thousand nine hundred and thirty-four, pursuant to which it is enacted.

§ 16

Effective Date.—This local law shall take effect immediately.

[fol. 63] EXHIBIT "D" ANNEXED TO AMENDED COMPLAINT
(LOCAL LAW No. 30 OF 1935)

A Local Law

To relieve the people of the city of New York from the hardships and suffering caused by unemployment and the effects thereof on the public health and welfare, by imposing an excise tax on the gross income of every person doing business within such city and subject to supervision of either division of the department of public service, and of

any and all other utilities doing business within such city to enable such city to defray the cost of granting unemployment work and home relief.

Be it enacted by the Municipal Assembly of The City of New York as follows:

§ 1

Definition.—When used in this local law:

(a) The word, "Person," or the plural thereof, includes and shall be deemed to refer to and mean corporations, companies, associations, joint stock associations, co-partnerships, estates, assignees or rents, any person acting in fiduciary capacity and/or persons, their assignees, lessees, trustees or receivers appointed by any court whatsoever, or by any other means.

(b) The word "comptroller" shall be deemed to refer to and mean the comptroller of the city of New York.

(c) The words "gross income" shall be deemed to refer to and include receipts received in or by reason of any sale made (except sale of real property) or service rendered [fol. 64] in the city of New York, including cash, credits and property of any kind or nature (whether or not such sale is made or such service is rendered for profit) without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or services or other costs, interest or discount paid, or any other expense whatsoever; also profits from the sale of securities; also profits from the sale of real property growing out of the ownership or use of or interest in such property; also profits from the sale of personal property (other than property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the period for which a return is made); also receipts from interest, dividends and royalties without any deductions therefrom for any expenses whatsoever incurred in connection with the receipt thereof, and also gains or profits from any source whatsoever.

(d) The words "gross operating income" shall be deemed to refer to and include receipts received in or by reason of any sale made or service rendered, of the prop-

erty and services specified in subdivision (e) of this section, in the city of New York, including cash, credits and property of any kind or nature, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or services or other costs, interests or discount paid, or any other expenses whatsoever.

(e) The word "utility" shall be deemed to refer to and mean any person subject to the supervision of either division of the department of public service, and every person whether or not such person is subject to such supervision [fol. 65] who shall engage in the business of furnishing or selling to other persons gas, electricity, steam, water, refrigeration, telephony and/or telegraphy or who shall engage in the business of furnishing or selling to other persons gas, electric, steam, water refrigeration, telephone or telegraph service.

(f) The word "return" includes any amended return filed or required to be filed as herein provided.

§ 2

Imposition of Excise Tax.—Notwithstanding any other provision of law to the contrary, for the privilege of exercising its franchise or franchises, or of holding property, or of doing business in the city of New York, from January first, nineteen hundred and thirty-six, to June thirtieth, nineteen hundred and thirty-six, or any part of such period, every utility doing business in the city of New York and subject to the supervision of either division of the department of public service, shall pay to the comptroller of the city of New York an excise tax which shall be equal to three per centum of its gross income for the period from January first, nineteen hundred and thirty-six to June thirtieth, nineteen hundred and thirty-six, and every other utility doing business in the city of New York shall pay to the comptroller of the city of New York an excise tax which shall be equal to three per centum of its gross operating income for the period from January first, nineteen hundred and thirty-six, to June thirtieth, nineteen hundred and thirty-six. Such tax shall be in addition to any and all other taxes and fees imposed by any other provision of law and shall be paid at the time and in the manner herein-

[fol. 66] after provided, but any utility subject to tax hereunder shall not be liable to any tax under local law of the local laws of the city of New York for the year nineteen hundred and thirty-five, board of estimate and apportionment introductory number ninety-five of the year nineteen hundred and thirty-five, with respect to its gross income or gross operating income as the case may be.

For the purpose of proper administration of this local law and to prevent evasion of the tax hereby imposed, it shall be presumed that the gross revenues or income of any such utility are derived from business conducted wholly within the territorial limits of the city of New York until the contrary is established, and the burden of proving that any part of its gross revenues or income is not so derived shall be upon such utility.

§ 3

Records to be Kept.—Every utility subject to tax hereunder shall keep such records of its business and in such form as the comptroller may by regulation require. Such records shall be offered for inspection and examination at any time upon demand by the comptroller or his duly authorized agent or employee and shall be preserved for a period of three years, except that the comptroller may consent to their destruction within that period or may require that they be kept longer.

§ 4

Returns; Requirements as to.—On or before the twenty-fifth day of February, nineteen hundred thirty-six, and on or before the twenty-fifth day of every month thereafter [fol. 67] until the twenty-fifth day of July, nineteen hundred thirty-six, every utility subject to tax hereunder shall file a return with the comptroller on a form to be furnished by the comptroller. Such return shall state the gross income or gross operating income as the case may be for the preceding calendar month, and shall contain any other data, information or matter which the comptroller may require to be included therein. The comptroller may require at any further time a supplemental return hereunder, which shall contain any data upon such matters as the comptroller may specify.

Every return required hereunder shall have annexed thereto an affidavit of the head of every such business making the same, or of the owner or of a co-partner thereof, or of the principal officer of the corporation if such business be conducted by a corporation, to the effect that the statements contained therein are true.

The comptroller may require amended returns to be filed within twenty days after notice and to contain the information specified in the notice.

§ 5

Payment of Tax.—At the time of filing of return, as provided under section four hereof, each utility shall pay to the comptroller such portion of the tax imposed by this local law as is equal to three per centum of its gross income or gross operating income as the case may be for the period covered by such return. Such portion of the tax shall be due and payable on the last day on which the return for such period is required to be filed, regardless of whether a return is filed or whether the return which is filed correctly indicates the amount of tax due.

[fol. 68]

§ 6

Determination of Tax by Comptroller.—In case the return required by section four hereof shall be insufficient or unsatisfactory to the comptroller, or if such return is not made as required, and if the maker fails to file a corrected or sufficient return within twenty days after the same is required by notice from the comptroller, the comptroller shall determine the amount of tax due from such information as he is able to obtain, and if necessary, may estimate the tax on the basis of external indices. The comptroller shall give notice of such determination to the person liable for such tax. Such determination shall finally and irrevocably fix such tax unless the person against whom it is assessed shall within thirty days after the giving of notice of such determination apply to the comptroller for a hearing or unless the comptroller of his own motion shall reduce the same. After such hearing the comptroller shall give notice of his decision to the person liable for the tax. The determination of the comptroller may be reviewed by certiorari if application therefor is made within thirty days after the giving of notice of such determination.

An order of certiorari shall not be granted unless the amount of any tax sought to be reviewed with penalties thereof, if any, shall be first deposited with the comptroller and an undertaking filed with the comptroller, in such amount and with such sureties as a justice of the supreme court shall approve, to the effect that if such order be dismissed or the tax confirmed the applicant for the writ will pay all costs and charges which may accrue in the prosecution of the certiorari proceeding.

[fol. 69]

§ 7

Proceedings to Recover Tax.—Whenever any person shall fail to pay any tax or part thereof or penalty imposed by this local law, as in this local law provided, the corporation counsel of the city of New York shall, upon the request of the comptroller, bring an action in the name of the city of New York to enforce payment of the same.

As an additional or alternate remedy, the comptroller may issue a warrant directed to the sheriff of any county within the city of New York, commanding him to levy upon and sell the real and personal property of the person from whom the tax is due, which may be found within his county, for the payment of the amount thereof, with any penalties, and the cost of executing the warrant, and to return such warrant to the comptroller and to pay to him the money collected by virtue thereof within sixty days after the receipt of such warrant. The sheriff shall within five days after the receipt of the warrant file with the clerk of his county a copy thereof, and thereupon such clerk shall enter in the judgment docket the name of the person mentioned in the warrant and the amount of the tax and penalties for which the warrant is issued and the date when such copy is filed. Thereupon the amount of such warrant so docketed shall become a lien upon the title to and interest in real property and chattels real of the person against whom the warrant is issued in the same manner as a judgment duly docketed in the office of such clerk. The sheriff shall then proceed upon the warrant in the same manner and with like effect, as that provided by law in respect to executions issued against property upon judgments of a [fol. 70] court of record, and for his services in executing the warrant he shall be entitled to the same fees, which he may collect in the same manner.

In the discretion of the comptroller a warrant of like terms, force and effect may be issued and directed to any officer or employee of the department of finance of the city of New York and in the execution thereof such officer or employee shall have all the powers conferred by law upon sheriffs, but he shall be entitled to no fee or compensation in excess of the actual expenses paid in the performance of such duty. If a warrant is returned not satisfied in full, the comptroller may from time to time issue new warrants and shall also have the same remedies to enforce the amount due thereunder as if the city of New York had recovered judgment therefor and execution thereon had been returned unsatisfied.

§ 8

Notices and Limitation of Time.—Any notice authorized or required under the provisions of this local law may be given by mailing the same to the person for whom it is intended in a post-paid envelope addressed to such person at the address given in any return filed by him pursuant to the provisions of this local law or if no return has been filed then to such address as may be obtainable. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this local law by the giving of notice shall commence to run from the date of mailing of such notice.

The provisions of the civil practice act relative to the limitation of time for the enforcement of a civil remedy shall not apply to any proceeding or action taken to levy, [fol. 71] appraise, assess, determine or enforce the collection of any tax or penalty provided by this local law.

§ 9

Penalties.—Any person failing to file a return or corrected return or to pay any tax or any portion thereof within the time required by this local law, shall be subject to a penalty of five per centum of the amount of tax due, plus one per centum of such tax for each month of delay or fraction thereof excepting the first month after such return was required to be filed or such tax became due; but the comptroller, if satisfied that the delay was excusable, may remit all or any part of such penalty. Such penalty shall

be paid to the comptroller and disposed of in the same manner as other receipts under this local law. Unpaid penalties may be enforced in the same manner as the tax imposed by this local law.

Any person and any officer of a corporation or copartner filing or causing to be filed any return, certificate, affidavit or statement required or authorized by this local law which is willfully false and any person who shall fail to file a return as required under this local law, and the officers of any corporation which shall so fail, shall be guilty of a misdemeanor, punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment.

The certificate of the comptroller to the effect that a tax has not been paid, that a return has not been filed, or that information has not been supplied pursuant to the provisions of this local law shall be prima facie evidence thereof.

[fol. 72]

§ 10

Refunds.—If within one year from the payment of any tax or penalty the payer thereof shall make application for a refund thereof and the comptroller or the court shall determine that such tax or penalty, or any portion thereof, was erroneously or illegally collected, the comptroller shall refund the amount so determined. For like cause and within the same period a refund may be so made on the initiative of the comptroller. Whenever a refund is made the comptroller shall state his reasons therefor in writing. However, no refund shall be made of a tax or penalty paid pursuant to a determination of the comptroller as provided in section six of this local law unless the comptroller after a hearing as in said section provided or of his own motion, shall have reduced the tax or penalty or it shall have been established in a certiorari proceeding that such determination was erroneous or illegal, in which event a refund shall be made as above provided upon the termination of such proceeding.

An application for a refund made as herein provided shall be deemed an application for a revision of any tax or penalty complained of and the comptroller may receive additional evidence with respect thereto. After making his determination the comptroller shall give notice thereof to the

person interested and he shall be entitled to a certiorari order to review such determination, subject to the provisions of section six in respect thereto.

[fol. 73]

§ 11

General Powers of Comptroller.—In the administration of this local law the comptroller shall:

First. Make such reasonable rules and regulations, not inconsistent with law as may be necessary for the exercise of his powers and the performance of his duties under this local law, and prescribe the form of blanks, reports and other records relating to the administration and enforcement of this local law.

Second. Assess, determine, revise, readjust and impose the taxes authorized to be imposed under this local law.

Third. Take testimony and proofs, under oath, with reference to any matter within the line of his official duty under this local law or he may designate and duly authorize an employee to act in his place for that purpose.

Fourth. To request information from the tax commission of the state of New York or the United States collector of internal revenue relative to any person; and to afford information to such tax commission; or such collector of internal revenue relative to any person, any other provision in this local law to the contrary notwithstanding.

§ 12

Administration of Oaths and Compelling Testimony.—The comptroller or his employee duly designated and authorized by the comptroller shall have power to administer oaths and take affidavits in relation to any matter or proceeding in the exercise of the powers and duties of the comptroller under this local law. The comptroller shall have power to subpoena and require the attendance of witnesses and the production of books, papers and documents pertinent to the investigations and inquiries which he is authorized to conduct under this local law, and to examine them in relation to any matter which he has power to investigate hereunder and to issue commissions for the examination of witnesses who are out of the state or unable to attend before him or excused from attendance.

A justice of the supreme court either in court or at chambers shall have power summarily to enforce by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers and documents called for by the subpoena of the comptroller hereunder.

Any person who shall testify falsely in any material matter pending before the comptroller hereunder shall be guilty of a misdemeanor and punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment.

The officers who serve the comptroller's summons or subpoena hereunder and witnesses attending in response thereto shall be entitled to the same fees as are allowed to officers and witnesses in civil cases in courts of record.

§ 13

Returns to be Secret.—Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for the comptroller or any officer or employee of the department of finance to divulge or make known in any manner, the receipts or any other information relating to [fol. 75] the business of a taxpayer contained in any return required under this local law.

The officers charged with the custody of such returns shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court, except on behalf of the city of New York or of the comptroller, or on behalf of any party to any action or proceeding under the provisions of this local law when the returns or fact shown thereby are directly involved in such action or proceeding, in either of which events, the court may require the production of, and may admit in evidence, so much of said returns or of the fact shown thereby, as are pertinent to the action or proceeding and no more.

Nothing herein shall be construed to prohibit the delivery to a taxpayer or his duly authorized representative of a certified copy of any return filed in connection with his tax, nor to prohibit the publication of statistics so classified as to prevent the identification of particular returns and the items thereof or the inspection by the corporation counsel of the city of New York or other legal representatives of such

city of the return of any taxpayer who shall bring action or proceeding to set aside or review the tax based thereon, or against whom an action or proceeding has been instituted or is contemplated for the collection of a tax or penalty. Returns shall be preserved for three years and thereafter until the comptroller orders them to be destroyed.

§ 14

Disposition of Revenues.—All revenues and moneys resulting from the imposition of the taxes imposed by this local law shall be paid into the treasury of the city of New [fol. 76] York and shall not be credited or deposited in the general fund of the city of New York, but shall be deposited in a separate bank account or accounts, and shall be available and used solely and exclusively for the purpose of relieving the people of the city of New York from the hardships and suffering caused by unemployment, including the repayment of moneys borrowed for such purpose.

§ 15

Application: Construction.—If any provision of this local law, or the application thereof to any person or circumstances, is held invalid, the remainder of this local law, and the application of such provisions to other persons or circumstances, shall not be affected thereby. This local law shall be construed in conformity with chapter eight hundred seventy-three, laws of nineteen hundred and thirty-four as amended by chapter six hundred one of the laws of nineteen hundred and thirty-five, pursuant to which it is enacted.

§ 16

This Local Law Shall Not be Deemed to Repeal or in any way affect local law number twenty-one for nineteen hundred and thirty-four, as amended by local law number two for nineteen hundred and thirty-five, but the aforesaid local laws shall remain in full force and effect.

§ 17

Effective Date.—This local law shall take effect immediately.

[fol. 77] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

[Same title]

STIPULATION AS TO EXHIBITS NOT PRINTED

It is hereby stipulated and agreed by and between the attorneys for the respective parties to this appeal, subject to the approval of the Court, that Contract No. 4 between the City of New York and the New York Municipal Railway Corporation, dated March 19, 1913, cited in the short-form order of Steuer, J., dated January 14, 1937, be omitted from this printed record on appeal, without prejudice to the rights of either party on this or any appeal to refer to said contract in briefs and upon argument, or to submit the original to the Appellate Court or Courts with the same force and effect as if printed herein, the reason assigned being that said exhibit is voluminous and would tend to clutter up the record.

Dated, March 3, 1937.

Paul Windels, Corporation Counsel, Attorney for Defendant-Appellant. George D. Yeomans, Attorney for Plaintiff-Respondent.

So Ordered: F. M.

[fol. 78] IN SUPREME COURT OF NEW YORK

OPINION OF STEUER, J.

(Reported in 97 New York Law Journal 241 on January 15, 1937)

N. Y. R. T. Corp'n v. City of N. Y.—This motion seeks dismissal of the complaint for failure to state a cause of action. The complaint seeks the recovery of moneys paid under protest, pursuant to Local Laws No. 21 of 1934, and Nos. 2 and 30 of 1935, upon the ground that these statutes are unconstitutional. The first objection to the pleading is to the form of the action. This is at law for money had and received, ordinarily the accepted form for the relief desired (*Aetna Ins. Co. v. The Mayor*, 153 N. Y., 331). The objection is based on section 10 of the act which is headed

"Refunds," and provides for application to the comptroller where a tax has been "erroneously or illegally collected" and for certiorari to review his decision. While in a sense the claim here is that the collection was illegal it is not such a claim as is contemplated by the section, and it is not that which would or could be entertained by the comptroller. Consequently the statutory provision lacks application here (*Buder v. First Nat. Bank in St. Louis*, 16 F., 2d, 990).

The plaintiff is a transportation corporation operating a railroad under contract with the defendant, which contract is known as Contract No. 4. Plaintiff is subject to the supervision of the Metropolitan Division of the Department of Public Service. By the local laws above enumerated the defendant city, pursuant to the authority vested in it by chapter 815, Laws 1933, and similar acts annually thereafter, imposed a tax of 3 per cent. upon the gross income of persons or corporations subject to the supervision of the said department. The purpose of the tax was provision for relief for the unemployed and the moneys so collected are provided to be held apart from other city funds.

The complaint seeks the recovery back of the moneys paid on several grounds. The first is that the local laws are unconstitutional in that they impair the obligations of Contract No. 4. The facts alleged to show the impairment are that the contract antedates the local laws. It provides that the revenues derived from the operation of the road be devoted to several purposes in order. Of these the second is taxes and assessments, which is followed by operating expenses, maintenance and depreciation. Then comes several sums payable to plaintiff representing a sum equal to what it was earning on its roads prior to entering into the contract, interest on its contribution to the cost of the road, and other interest payable to it. The claim is that by the imposition of this tax plaintiff's opportunity to receive from the income of the road the sums collectible by it are reduced as the payment of taxes comes ahead of these sums. The contract contains no agreement that taxes in addition to those current at the time of its execution will not be levied. In fact the contrary is expressly indicated. The claim is, therefore, that there is an implied condition that the city will do nothing which may tend to reduce the amount collectible by plaintiff under its contract. A contract with a governing power contains no such implied condition where

the act complained of is the legitimate exercise of a governmental function. Assuming the act to be of such a character the city may operate a competing business and it may tax its contractee's business and exempt its own from taxation (*Puget Sound Co. v. Seattle*, 291 U. S., 619). It is [fol. 80] further pleaded in this connection that the Enabling Acts (chap. 815, Laws of 1933 et seq.) give no authority to defendant to tax this plaintiff. The inspiration for this claim rests on nothing in the Enabling Act but on the fact that Contract No. 4 was executed in accordance with the Rapid Transit Act (chap. 4, Laws 1891 as amended), and that pursuant to the direction of that act the revenues receivable by the city are to be used for a purpose specified alike in the act and the contract. It is claimed that the local laws will deprive the city of revenues from the contract because of the sums collected as taxes, and these sums will not be employed in the manner designated in the Rapid Transit Act. It is concluded that the local laws are for that reason in derogation of the Rapid Transit Act, and while it is conceded that the State Legislature might have given the local legislature authority to enact such legislation it is not to be presumed that it did so without an express grant to that effect. The conclusion reached would be sound were it based on a sound hypothesis (*Socony-Vacuum Oil Co., Inc., v. City of New York*, 247 App. Div., 163, holding that the Enabling Act gives no authority to impose a tax repugnant to the established policy of the state). As a matter of theory the local law does not prevent the coming into existence of a balance payable to the defendant city for the purposes of the Rapid Transit Act, and as a matter of fact there is no allegation in the complaint that the effect of the local law has been to prevent such a balance. Furthermore, while this particular tax was not in contemplation when the Rapid Transit Act became law, nothing in that act is in conflict with the conception of there being taxes imposed which would, of necessity, reduce the payments provided to be made to the defendant.

[fol. 81] The tax is next alleged to be unconstitutional on the ground that it takes from the receipts of the plaintiff such a sum that the remainder does not equal a fair return on its investment. This contention was practically abandoned on the argument, and rightfully so, for, "even if the tax should destroy a business it would not be made invalid

or require compensation on that ground alone" (*Alaska Fish Co. v. Smith*, 255 U. S., 44, 48).

The next contention is founded on these two facts: The tax is a tax on utilities and the proceeds are segregated and devoted to the relief of unemployed persons. From these facts it is argued that this measure is not a tax but an exaction from one group for the benefit of the other and, not being regulatory, is without authority. A tax upon utilities as a group is a valid classification (*New York Steam Corp'n v. City of New York*, 268 N. Y., 137). It is true that in the absence of some connection between the group taxed and the beneficiaries thereof, if such beneficiaries there be, renders an impost not a tax but an illegal exaction (*United States v. Butler*, 297 U. S., 1). Here there is no group or class that are the beneficiaries. The unemployed are not connected by ties of origin, location or occupation. They are no more a class than are the aged, the insane or the sick. Their relief has been held beyond dispute to be a duty of the state. "If the moral and physical fibre of its manhood and its womanhood is not a state concern, the question is, what is?" (*Adler v. Deegan*, 251 N. Y., 467, 484). The argument that this is an exaction for the benefit of a class is untenable.

Additional facts are alleged from which conclusions are drawn as to the validity of the local laws. Certain of these claims are set forth in various forms, but analysis reduces [fol. 82] them to the following: The tax being on gross income is improper because it is ruinous and because it creates inequality; the tax places a greater burden on one group of taxpayers, the utilities, than on others; the tax is improper in that it is imposed upon some engaged in transportation and not others; that the method of defining utilities in the local law is unfair thereby making an improper classification; and, particularizing, the plaintiff differs from the other utilities in that it is prevented by contract from increasing its rates and cannot pass the effect of the tax on to its consumers.

Investigating these in order it will be seen from the foregoing that the weight of the burden of the tax does not affect its validity. The point of inequality is factually supported. Plaintiff does business on a shorter margin of profit than many of the other persons subject to the tax. The consequent result is that the percentage of plaintiff's

profit taken by the tax exceeds that taken from the others in the same group. It is shown that this difference amounts in at least one instance to 300 per cent. It is further alleged that this discrepancy comes about not through different methods of management or the like, but because of the essential differences in the nature of the business conducted by the two utilities. Exact equality is not required of a tax (*Clark v. Titusville*, 184 U. S., 329). Nor is there anything inherently improper in a tax on gross receipts (*Metropolis Theatre Co. v. Chicago*, 228 U. S., 61). Where, however, gross inequalities result from that method of taxation, and where this inequality is effectuated by the definition of the class to be taxed, the tax must fail (*Stewart Dry Goods Co. v. Lewis*, 294 U. S., 550). On this point the [fol. 83] allegations of the complaint are sufficient. It may be noted that this question was not raised in the previous cases where the validity of the local laws was under inquiry.

The claim of unconstitutionality because of the unusual burden placed by the tax on utilities has been disposed unfavorably to the plaintiff's position (*N. Y. Steam Corp'n v. City*, supra), as has the contention that others engaged in similar businesses are not taxed (*So. Blvd. R.R. v. City of N. Y.*, C. C. A., 2nd Circuit, 1936, not yet officially reported). To the last contention, which refers to plaintiff's inability to pass the tax on to its customers, in which its position differs from the other utilities, it is a sufficient answer that this is an accident of trade whose consequence must be accepted as inherent in our form of government (see *Fox v. Standard Oil Co. of N. J.*, 294 U. S., 87, 102).

The motion is denied without prejudice to a motion by defendant to strike out such portions of the complaint as are irrelevant to the one issue which is valid. Order signed.

[fol. 84] IN SUPREME COURT OF NEW YORK

WAIVER OF CERTIFICATION

It is hereby stipulated that the foregoing are correct copies of the notice of appeal to the Appellate Division, the order appealed from, the opinion of Steuer, J., and all the papers on which said order and opinion are founded, all of which are now on file in the office of the Clerk of the

County of New York; and certification thereof pursuant to Section 170 of the Civil Practice Act or otherwise is hereby waived.

Dated, New York, March 12, 1937.

Paul Windels, Corporation Counsel, Attorney for
Defendant-Appellant. George D. Yeomans, At-
torney for Plaintiff-Respondent.

[fol. 85] IN SUPREME COURT OF NEW YORK, NEW YORK
COUNTY

[Title omitted]

NOTICE OF APPEAL TO THE COURT OF APPEALS

SIRS:

Please take notice that the defendant pursuant to leave granted by an order of the Appellate Division of the Supreme Court, First Department, dated the first day of June, 1937, hereby appeals to the Court of Appeals from the order of the said Appellate Division of the Supreme Court, First Department, dated the 21st day of May, 1937, and entered in the office of the Clerk of said Appellate Division on or about the same day, which order affirmed the order entered herein in the office of the Clerk of the County of New York on or about the 15th day of January, 1937, denying defendant's motion to dismiss the complaint herein [fol. 86] and defendant appeals from each and every part of said Appellate Division order as well as from the whole thereof.

Dated, June 1, 1937.

Yours, etc., Paul Windels, Corporation Counsel, At-
torney for Defendant, Office & P. O. Address,
Municipal Building, Borough of Manhattan, City
of New York.

To George D. Yeomans, Esq., Attorney for Plaintiff, 385
Flatbush Avenue Ext., Borough of Brooklyn, New York
City.

To Hon. Albert Marinelli, Clerk of New York County.

[fol. 87] IN SUPREME COURT OF NEW YORK, APPELLATE
DIVISION

[Title omitted]

ORDER GRANTING LEAVE TO APPEAL TO THE COURT OF
APPEALS—June 1, 1937

The above named defendant having moved for leave to appeal to the Court of Appeals from the order of this Court entered herein on the 21st day of May, 1937,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavit of Paxton Blair in support of said motion, and after hearing Mr. Paul Windels for the motion, and the respondent appearing but not opposing,

It is hereby ordered that the said motion be and the same hereby is granted, and this Court hereby certifies that in [fol. 88] its opinion a question of law is involved which ought to be reviewed by the Court of Appeals, as follows:

Does the complaint herein state facts sufficient to constitute a cause of action?

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

Present: Hon. Francis Martin, Presiding Justice. Hon. Alfred H. Townley, Hon. Edward S. Dore, Hon. Albert Cohn, Hon. Joseph M. Callahan, Justices.

3978

NEW YORK RAPID TRANSIT CORPORATION, Respt.,

vs.

THE CITY OF NEW YORK, Applt.

ORDER OF AFFIRMANCE—May 21, 1937

An appeal having been taken to this Court by the defendant from an order of the Supreme Court, New York [fol. 89] County, entered on or about the 15th day of January, 1937, denying defendant's motion for judgment dismissing the complaint and said appeal having been argued by Mr. Sol. Charles Levine, of counsel for the

appellant, and by Mr. Harold L. Warner, of counsel for the respondent; and due deliberation having been had thereon,

It is hereby ordered that the order so appealed from be and the same is hereby affirmed with \$20 costs and disbursements to the respondent, with leave to the defendant to answer within twenty days after service of a copy of this order with notice of entry thereof upon payment of said costs. Two of the Justices dissenting and voting to reverse and grant the motion.

[fol. 90] IN SUPREME COURT OF NEW YORK

AFFIDAVIT OF NO OPINION

STATE OF NEW YORK,
County of New York, ss:

John A. Leddy, being duly sworn, says that he is Acting Chief Clerk in the office of the Corporation Counsel of The City of New York; that no written opinion or memorandum was handed down by the Appellate Division in deciding this appeal.

John A. Leddy.

Sworn to before me this 3rd day of June, 1937. Hugh H. Senior, Notary Public, Bronx County. Certificate filed in New York County.

[fol. 91] IN SUPREME COURT OF NEW YORK

WAIVER OF CERTIFICATION

It is hereby stipulated that the foregoing are correct copies of the notice of appeal to the Court of Appeals, the order granting leave to appeal to the Court of Appeals, the order of affirmance, and all the papers upon which said order of affirmance is founded, all of which are now on file in the office of the Clerk of the County of New York; and certification thereof pursuant to Section 170 and Section 616 of the Civil Practice Act or otherwise is hereby waived.

Dated, New York, June 3rd, 1937.

George D. Yeomans, Attorney for Plaintiff-Respondent. Paul Windels, Corporation Counsel, Attorney for Defendant-Appellant.

[fol. 92] IN COURT OF APPEALS OF NEW YORK

REMITTITUR—July 13, 1937

[fol. 93] NEW YORK RAPID TRANSIT CORPORATION, Respondent,

ag'st

THE CITY OF NEW YORK, Appellant

Be it Remembered, That on the 4th day of June, in the year of our Lord one thousand nine hundred and thirty-seven The City of New York, the appellant in this cause, came here unto the Court of Appeals, by Paul Windels, its attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And New York Rapid Transit Corporation, the respondent in said cause, afterwards appeared in said Court of Appeals by George D. Yeomans, its attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Paxton Blair, of counsel for the appellant, and by Mr. Harold L. Warner, of counsel for the respondent, brief filed by amicus curiæ, and after due deliberation had thereon, did order and adjudge that the orders herein be and the same hereby are reversed and complaint dismissed, with costs in all courts. Question certified answered in the negative.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said orders be reversed and complaint dismissed, with costs in all courts. [fol. 94] Question certified answered in the negative, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, First Judicial Department, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to

law, and which record now remains in the said Appellate Division before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS

Clerk's Office

Albany, July 13 1937.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal.)

[fol. 95] Clerk's certificate to opinion omitted in printing.

[fol. 96] **IN COURT OF APPEALS OF NEW YORK**

NEW YORK RAPID TRANSIT CORPORATION, Respondent

THE CITY OF NEW YORK, Appellant

Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, which affirmed an order of Special Term denying a motion to dismiss the complaint.

The following question was certified: "Does the complaint herein state facts sufficient to constitute a cause of action?"

Paul Windels, Corporation Counsel (Paxton Blair, Oscar S. Cox, Sel Charles Levine and Meyer Bernstein of counsel), for appellant.

Harold L. Warner, for respondent.

OPINION—July 13, 1937

FINCH, J.:

The city of New York appeals from the denial of a motion to dismiss the complaint, affirmed without opinion by the Appellate Division, two justices dissenting, and here by

reason of the Appellate Division certifying the question: Does the complaint herein state facts sufficient to constitute a cause of action?

This is an action for money had and received, brought by a transit company to recover taxes paid under protest, upon the ground that the taxing statutes are unconstitutional.

The city of New York, pursuant to enabling acts passed by the State Legislature, which empowered the city to impose any tax or taxes which the Legislature itself could impose, to raise money for unemployment relief, has enacted local laws placing a tax of three per cent on the gross income of all utilities subject to the supervision of either division of the Department of Public Service. (Local Law No. 30, 1935; Local Law No. 21, 1934, as amended by Local Law No. 2, 1935.)

At the outset, the city urges that the complaint should be dismissed on the ground that the remedy by way of action for money had and received is not available since the local laws provide an exclusive remedy for the recovery of illegally collected taxes, whether the illegality of the collection is because of over-assessment, over-valuation, or unconstitutionality. The remedy provided by the local laws furnishes a more expeditious procedure than the action at common law with its six year Statute of Limitations. It requires that all applications for refunds be made within one year of the payment of the tax and that a review by [fol. 97] certiorari be applied for within thirty days of the refusal of the Comptroller to grant the refund. (Local Law No. 30, 1935, § 10; Local Law No. 21, 1934, as amended by Local Law No. 2, 1935, § 10.)

The provision on which the city relies applies to applications for refunds when the tax is, "erroneously or illegally collected." The city points out that this is not a case where the laws as a whole are void. As applied to other public utilities they are perfectly valid. Only as applied to corporations situated as is the plaintiff is the claim made that they are void. But while it is clear that an exclusive remedy is provided for the recovery of illegal or erroneous exactions of an otherwise valid tax, it is not at all clear that it was intended to apply where the claim is made that the tax itself is void because of unconstitutionality. In view of this ambiguity we cannot construe the laws as depriving

the plaintiff of the common law remedy of action for money had and received. (See *Buder v. First Nat. Bank*, 16 Fed. Rep. [2d] 990, 993; certiorari denied, 274 U. S. 743.) Having reached the conclusion that the exclusive remedy provided for by the local law does not apply where it is claimed that the tax is unconstitutional, it becomes unnecessary to determine whether the powers delegated by the Legislature to the city of New York included the power to provide such an exclusive remedy.

This brings us to the contention that the tax is unconstitutional.

The constitutionality of this statute, in so far as the tax is levied on certain other public utilities, has been upheld. (*New York Steam Corp. v. City of New York*, 268 N. Y. 137; *Garfield v. New York Tel. Co.*, 268 N. Y. 549.) The contention is now made that in so far as the tax is levied on transit companies bound by contract to exact no more than a five-cent fare, it is invalid. This argument has been rejected in the Federal courts (*Southern Blvd. Ry. Co. v. City of New York*, 86 Fed. Rep. [2d] 633; certiorari denied, 301 U. S. —), but that determination, while entitled to great weight, is not binding on this court.

At Special Term the complaint was held invalid on every ground save one, and that presents the major question for decision. To paraphrase that ground as alleged in the complaint, the tax was imposed at the same rate on gross incomes of different types of corporations " * * * which are so essentially different in character that the ratio of net income to gross receipts in the case of one is radically less than in the case of another * * *."

Special Term, after conceding that exact equality is not required of a tax and that there is nothing inherently improper in a tax on gross receipts, sustained the complaint on the ground that " * * * gross inequalities result from that method of taxation, and where this inequality is effectuated by the definition of the class to be taxed, the tax must fail," citing *Stewart Dry Goods Co. v. Lewis* (294 U. S. 550).

[fol. 98] The particular inequality and inequity claimed by the plaintiff is that it is arbitrarily classified, and that the burden of the tax does not fall equally on all those within the group—that the transit companies are required to pay a much greater percentage of their profits than other

utilities. In other words, the constitutional objection is to the inclusion of corporations with relatively small net earnings under a fixed income tax rate, in a class with corporations enjoying a ratio of net to gross so radically different as to effect an inequality of burden. Even if so, this does not furnish sufficient reason for declaring a tax invalid where it is imposed upon a group otherwise reasonably classified. Thus in *Alaska Fish Co. v. Smith* (255 U. S. 44), a tax imposed on herring products was held valid although no tax was levied on other fish or fish products. Also taxes imposed upon wholesale dealers in oil and like products, and not on other wholesale dealers (*S. W. Oil Co. v. Texas*, 217 U. S. 114), and taxes upon chain stores (*Tax Commissioners v. Jackson*, 283 U. S. 527), and many like taxes, have been upheld although it is evident that the burden of the tax falls more heavily on some in the classification than on others, whether by reason of low margin of profit, contractual obligations, competition, or other circumstances. The remedy if needed lies not with the judiciary but with the Legislature. (*McCray v. United States*, 195 U. S. 27, 56 et seq.)

The tax on gross receipts, which was held unconstitutional in *Stewart Dry Goods Co. v. Lewis* (294 U. S. 550), was a graduated or sliding scale tax on gross receipts, as contrasted with the fixed rate tax in the case at bar, and it was held therein by a majority of the court that there had been "no finding that the relation between gross sales and net profits, or increase of net worth, was constant, or even that there was a rough uniformity of progression within wide limits of tolerance" (p. 559).

The fallacy in the contention that the tax is unconstitutional because it classifies transit companies having a present small margin of profit and contractual inhibition against raising the fare charged by them, with other utilities having much larger margins of profit, is further revealed when we take into consideration that transit companies might have been grouped by themselves and a three per cent gross receipts tax imposed while a separate three per cent tax was imposed on other utilities. The transit companies could make no valid objection to a tax so imposed. Concerned as we are primarily with substance rather than form, we see no reason for holding a tax on a certain type of

utility invalid because it is imposed as part of a general tax on all utilities, when the same result could have been achieved by taxing various types of utilities under separate classifications.

The plaintiff insists also that the complaint is sufficient upon other grounds denied by the court at Special Term and affirmed by the Appellate Division. The plaintiff argues that the tax in question impairs the obligations of the contract of plaintiff with the city in violation of section 10 of article I of the Federal Constitution. The fact that the transit company, with State sanction, has entered into a contract with the city of New York which provides that it shall not charge more than a five-cent fare, in and of [fol. 99] itself does not entitle it to exemption from tax. It has long been established that a grant of a franchise does not carry with it an implied surrender of the power to tax. (*Memphis Gas Light Co. v. Shelby County*, 109 U. S. 398; *St. Louis v. United Rys. Co.*, 210 U. S. 266; *Puget Sound Light & Power Co. v. Seattle*, 291 U. S. 619.)

In *Brooklyn Bus Corp. v. City of New York* (274 N. Y. 140, 147) the contract specifically provided that "any new form of tax or additional charge that may be imposed by any ordinance of the City or resolution of the Board upon or in respect of the franchise . . . shall be deducted from the compensation payable to the City." In that case we held that the contract provision was intended to apply to local laws as well as other forms of additional taxes. The contracts of the transit companies with the city contain no such provision, and no reason appears for reading such a provision into the contracts. The transit companies contracted with the city to provide service at a five-cent fare, and to apportion their gross revenues according to a formula whereby the city and the companies are to share the income, but only after the companies have been paid interest and sinking fund allowances on new moneys invested in the project. Taxes, of course, have priority over such interest and sinking fund payments.

Nevertheless, an attempt is made to argue that the imposition of the tax impairs the obligations of the contract in violation of article I, section 10, of the Federal Constitution because it enables the city to obtain funds out of the gross income without giving priority to the interest and sinking fund payments. The right to tax cannot be

lost by such tenuous implication, and all doubt vanishes when we find that the contract itself makes provision for the deduction of taxes from gross revenues, and refers to "all taxes or other governmental charges of every description (whether on physical property, stock or securities, corporate or other franchises, or otherwise) assessed or which may hereafter be assessed against the lessee in connection with or incident to the operation of the railroad and the existing railroads." There is thus no basis whatever for reading into the above contract any express or implied obligation on the part of the city to surrender its power to tax the privilege granted to the plaintiff under laws either in existence at the time of the contract or thereafter enacted. Nor can any merit be found in the argument that the enabling acts, although general in language, must be construed as not intended to apply to transit companies because of their pre-existing contracts with the city.

Plaintiff further contends that the local laws in question deny plaintiff the equal protection of the laws under the Federal Constitution, in that they classify street railroad corporations and other utilities for taxation at a higher rate than ordinary business corporations for the special purpose of unemployment relief.

No one of the above contentions is well founded. We have already decided that the imposition of a tax on utility companies without imposing a similar tax on other industries and businesses is a valid classification and does not constitute a denial of the equal protection of the laws. (New York Steam Corp. v. City of New York, 268 N. Y. 137; Puget Sound Power & Light Co. v. Seattle, 291 U. S. 619.)

Likewise the tax is not invalid because imposed upon utilities with the proceeds earmarked for purposes of unemployment relief. In sustaining the imposition upon the processing of cocoanut oil of a tax which Congress declared should "be held as a separate fund and paid to the Treasury of the Philip-ine Islands" (48 U. S. Stat. 680, 763), the court said: "Standing apart, therefore, the tax is unassailable. It is said to be bad because it is earmarked and devoted from its inception to a specific purpose. But if the tax, qua tax, be good, as we hold it is, and the purpose specified be one which would sustain a subsequent and separate appropriation made out of the general funds of the Treasury,

neither is made invalid by being bound to the other in the same act of legislation." (*Cincinnati Soap Co. v. United States*, 301 U. S. —; 57 Sup. Ct. Rep. 764.)

Nor may street railroads successfully resist this tax because of alleged competition by city owned subways and by taxicabs, both of which are exempted from this classification. A city's conduct in operating its own subways, and exempting them from taxation, does not render an act unconstitutional. (*Puget Sound Power & Light Co. v. Seattle*, 291 U. S. 619.) Innumerable valid reasons suggest themselves for treating taxicabs differently from transit companies and other utilities. (See *Hicklin v. Coney*, 290 U. S. 169, and cases cited therein.)

Plaintiff further contends that the tax bears so heavily upon it as not to constitute taxation at all, but to amount to a taking of its property without compensation in violation of the due process clause of the Fourteenth Amendment to the Federal Constitution.

Plaintiff seeks to support the above contention through a process of elimination by insisting that these taxes cannot be justified otherwise and hence must amount to a taking of property. As we have heretofore shown, the classification of the utilities and the imposition of these taxes for unemployment relief is not unlawful. Moreover, hardship arising from the burden of taxation or excessiveness does not render invalid an otherwise valid tax. (*Fox v. Standard Oil Co.*, 294 U. S. 87. Cf. *Great Northern A. & P. Co. v. Grosjean*, 301 U. S. —; *Power v. Pennsylvania*, 127 U. S. 678.)

It follows that the orders should be reversed and the complaint dismissed with costs in all courts, and the question certified answered in the negative.

Crane, Ch. J., Lehman, Hubbs, Loughran and Rippey, JJ., concur; O'Brien, J., taking no part.

Orders reversed, etc.

[fol. 101] IN SUPREME COURT OF NEW YORK, APPELLATE
DIVISION

NEW YORK RAPID TRANSIT CORPORATION, Plaintiff-
Respondent,

against

THE CITY OF NEW YORK, Defendant-Appellant

ORDER ON REMITTITUR—August 4, 1937

The defendant-appellant, pursuant to leave granted by an order of this Court dated the 1st day of June, 1937, having appealed to the Court of Appeals from the order of this Court dated the 21st day of May, 1937 and entered in the office of the Clerk of this Court on or about the same day, which order affirmed with \$20. costs and disbursement, the order of the Special Term entered herein in the office of the Clerk of the County of New York on or about the 15th day of January, 1937 denying defendant-appellant's motion for judgment dismissing the complaint herein, and this Court having certified to the said Court of Appeals the following question, to wit:

“Does the complaint herein state facts sufficient to constitute a cause of action?”

And the said appeal having been duly argued at the Court [fol. 102] of Appeals, and that Court, in an order dated the 13th day of July, 1937, having ordered and adjudged that the order of this Court so appealed from and the order of the Special Term aforesaid be reversed and the complaint dismissed with costs in all courts and the question certified answered in the negative, and having further ordered that the record and proceedings in said Court of Appeals be remitted to this Court, there to be proceeded upon according to law.

Now, upon reading and filing the remittitur from the said Court of Appeals, and on motion of Paul Windels, Corporation Counsel attorney for defendant-appellant, it is

Ordered that the order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this Court.

[fol. 102½] Please take notice, that an Order, of which the within is a copy, was this day duly entered in the office of the

Clerk of the Appellate Division of the Supreme Court in and for the First Judicial Department on the 4th day of August 1937 and a certified copy of said order was duly filed in the Office of the Clerk of the County of New York on the 9th day of August 1937.

Yours, etc., Paul Windels, Corporation Counsel, Attorney for Deft.-Applt., Municipal Building, Borough of Manhattan, New York City.

To George D. Yeomans Esq., Attorneys for pl—, 385 Flatbush Ave., Ext., Bklyn., N. Y.

Copy received Aug. 11, 1937. George D. Yeomans, Attorney for —.

[fol. 103] IN SUPREME COURT OF NEW YORK, NEW YORK COUNTY

NEW YORK RAPID TRANSIT CORPORATION, Plaintiff-Respondent,

against

THE CITY OF NEW YORK, Defendant-Appellant

JUDGMENT ON REMITTITUR

The defendant-appellant having appealed to the Court of Appeals from the order of the Appellate Division, First Department, dated the 21st day of May, 1937 and entered in the office of the Clerk of said Appellate Division, on or about the same day, which order affirmed with \$20.00 costs and disbursements the order of the Special Term entered herein in the office of the Clerk of the County of New York on or about the 15th day of January, 1937, denying defendant-appellant's motion for judgment dismissing the complaint herein, and the said appeal having been duly argued at the Court of Appeals and that Court in an order dated the 13th day of July, 1937, having ordered and adjudged that the order of the Appellate Division, First Department, so appealed from be reversed and the complaint dismissed with costs in all Courts, upon the ground that the complaint does not state facts sufficient to constitute a cause of action, and having remitted the record and proceedings in said Court of Appeals to the Appellate Division, First Department, there to be proceeded upon according to law, and an

order having been duly filed and entered in the office of the Clerk of the said Appellate Division on or about the 4th day of August, 1937, making the order and judgment of the [fol. 104] Court of Appeals the order and judgment of the Appellate Division, First Department, and a certified copy of said order having been duly filed and entered in the office of the Clerk of the County of New York on the 9th day of August, 1937, and the costs of the defendant-appellant having been duly taxed at the sum of \$365.27.

Now, on motion of Paul Windels, Corporation Counsel, attorney for defendant-appellant it is

Adjudged that the complaint be and the same hereby is dismissed upon the ground that the complaint does not state facts sufficient to constitute a cause of action; and it is further

Adjudged that the defendant-appellant, The City of New York (Municipal Building, New York City), recover of the plaintiff-respondent, New York Rapid Transit Corporation (385 Flatbush Avenue Extension, Borough of Brooklyn, New York City) the sum of \$365.27 costs as taxed, and that said defendant-appellant have execution therefor.

Dated, August 9 1937.

Albert Marinelli, Clerk.

[fol. 104½] Please take notice that a Judgment of which the within is a copy, was this day duly entered and filed in the office of the Clerk of the County of New York.

New York August 9, 1937.

Yours, etc., Paul Windels, Corporation Counsel, Municipal Building, Borough of Manhattan, New York City.

To George D. Yeomans, Esq., Attorney for Plaintiff, 385 Flatbush Ave. Ext., Bklyn., N. Y.

Copy received Aug. 11, 1937. George D. Yeomans, Attorney for Plaintiff.

[fol. 105] IN SUPREME COURT OF NEW YORK, NEW YORK COUNTY

[Title omitted]

ORDER RESETTLING JUDGMENT—August 11, 1937

Upon the annexed approval as to form and waiver of notice of settlement and on motion of Paul Windels, Cor-

poration Counsel, attorney for defendant-appellant, it is Ordered that the judgment entered herein in the office of the Clerk of the County of New York on the 9th day of August, 1937, be and the same hereby is resettled so as to read as follows:

"SUPREME COURT, NEW YORK COUNTY

**NEW YORK RAPID TRANSIT CORPORATION, Plaintiff-
Respondent,**

against

THE CITY OF NEW YORK, Defendant-Appellant

The defendant-appellant having appealed to the Court of Appeals from the order of the Appellate Division, First Department, dated the 21st day of May, 1937 and entered in the office of the Clerk of said Appellate Division, on or about the same day, which order affirmed with \$20.00 costs and disbursements the order of the Special Term entered herein in the office of the Clerk of the County of New York on or about the 15th day of January, 1937, denying defend-[fol. 106] ant-appellant's motion for judgment dismissing the complaint herein, and the said appeal having been duly argued at the Court of Appeals and that Court in an order dated the 13th day of July, 1937, having ordered and adjudged that the said order of the Appellate Division, First Department, and the said order of the Special Term be reversed and the complaint dismissed with costs in all Courts, upon the ground that the complaint does not state facts sufficient to constitute a cause of action, and having remitted the record and proceedings in said Court of Appeals to the Appellate Division, First Department, there to be proceeded upon according to law, and an order having been duly filed and entered in the office of the Clerk of the said Appellate Division on or about the 4th day of August, 1937, making the order and judgment of the Court of Appeals the order and judgment of the Appellate Division, First Department, and a certified copy of said order having been duly filed and entered in the office of the Clerk of the County of New York on the 9th day of August, 1937, and the costs of the defendant-appellant having been duly taxed at the sum of \$365.27

Now, on motion of Paul Windels, Corporation Counsel, attorney for defendant-appellant, it is

Adjudged, that the said order of the Appellate Division, First Department, and the said order of the Special Term be and the same hereby are reversed; and it is further

Adjudged, that the complaint be and the same hereby is dismissed upon the ground that the complaint does not state facts sufficient to constitute a cause of action; and it is further

Adjudged, that the defendant-appellant, The City of New York (Municipal Building, New York City), recover of the plaintiff-respondent, New York Rapid Transit Corporation (385 Flatbush Avenue Extension, Borough of Brooklyn, New York City) the sum of \$365.27 costs as taxed, and that said defendant-appellant have execution therefor.

Dated, August 9, 1937.

Albert Marinelli, Clerk."

Enter.

C. P., J. S. C.

[fol. 107] The foregoing order is hereby approved as to form and notice of settlement thereof waived.

Dated, August 11, 1937.

George D. Yeomans, Attorney for Plaintiff-Respondent.

[fol. 107½] Please take notice that an Order, of which the within is a copy, was this day duly entered and filed in the office of the Clerk of the County of New York.

New York, Aug. 12, 1937.

Yours, etc., Paul Windels, Corporation Counsel, Attorney for the Defendant, Municipal Building, Borough of Manhattan, New York City.

To George D. Yeomans, Esq., Attorney for Plaintiff, 385 Flatbush Ave. Ext., Bklyn., N. Y.

Copy received Aug. 16, 1937. George D. Yeomans, Attorney for —.

[fol. 108] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL

The petition of New York Rapid Transit Corporation, the appellant in the above entitled cause, for an appeal in the above entitled cause to the Supreme Court of the United

States from the judgment of the Supreme Court of the State of New York, having been filed with the Clerk of this Court and presented herein, accompanied by assignments of error and statement of jurisdiction under Rule 12 of the Rules of the United States Supreme Court, all as provided by Rule 46 of said Rules, together with a prayer for reversal, and the record in this cause having been considered, and it appearing from said petition and the record in the above entitled cause that there was drawn in question the validity of Local Law No. 21 of 1934, as amended, and Local Law No. 30 of 1935, of the City of New York on the ground that said Local Laws deny to the appellant the equal protection of the law and deprive the appellant of its property without due process of law, all in violation [fol. 109] of the Fourteenth Amendment to the Constitution of the United States, and on the further ground that said Local Laws impair the obligation of the contract between the appellant and the appellee known as "Contract No. 4" in violation of Section 10 of Article 1 of said Constitution and that the decree of the court was in favor of the validity of said Local Laws, it is hereby

Ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of New York, dated the 9th day of August, 1937, as resettled by order of said Supreme Court of the State of New York, dated August 11, 1937, as prayed in said petition, and that the Clerk of the Supreme Court of the State of New York, to which court the record herein has been remitted, shall, within forty days from this date, make and transmit to the Supreme Court of the United States, under his hand and the seal of said Court, a true copy of the material parts of the record herein, which shall be designated by præcipe or stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

It is further Ordered that the said appellant shall give a good and sufficient bond in the sum of Five Hundred Dollars, and that said appellant shall prosecute said appeal to effect and answer all costs if it fails to make its plea good.

Dated August 24, 1937.

Frederick E. Crane, Chief Judge of the Court of Appeals of the State of New York.

[fol. 110] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL

To the Chief Judge of the Court of Appeals of the State of New York:

Your petitioner, New York Rapid Transit Corporation, appellant in the above entitled cause, respectfully shows:

This action was brought in the Supreme Court of the State of New York, New York County, to recover the sum of \$1,408,697, together with interest thereon, which sum had been paid by your petitioner to the defendant-appellee, The City of New York, involuntarily, under duress and compulsion, and under written protest, as taxes under certain Local Laws of the City of New York, known as Local Laws No. 21 of 1934, as amended, and No. 30 of 1935, which Local Laws were purportedly enacted by the Municipal Assembly of the City of New York under and pursuant to the authority granted, respectively, by Acts of the Legislature of the State of New York known as Chapter 873 of the Laws of 1934 and Chapter 601 of the Laws of 1935, the State Legislature having by said Acts delegated to The [fol. 111] City of New York the power during certain specified periods to adopt and amend local laws imposing any tax which the State Legislature itself could have imposed for the purpose of raising money for unemployment relief.

The amended complaint herein (hereinafter called the complaint) alleges that the so-called taxes thus sought to be recovered by your petitioner were illegally collected and received by the appellee because the said Local Laws are, and each of them is, unconstitutional, null and void, being in violation of Section 10 of Article 1 of, and of Section 1 of the Fourteenth Amendment to, the Constitution of the United States.

The defendant-appellee, The City of New York, made a motion at Special Term, Part III, of the said Supreme Court, New York County, for an order dismissing the complaint and directing judgment for said defendant on the ground that the complaint did not state facts sufficient to constitute a cause of action, and on the further ground that the said Court had no jurisdiction of the action. Said

motion was denied by the Justice of the Court before whom the motion was argued, with an opinion in which he held that the Court had jurisdiction of the action and that the allegations of the complaint sufficiently showed that the Local Laws in question denied to your petitioner the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States, it appearing from the complaint that a tax measured by a percentage of gross income and imposed upon all "utilities", as defined in said Local Laws, resulted in taking a far larger proportion of the net income of your petitioner and other [fol. 112] street railroad companies for the special purpose of unemployment relief, than of the net income of other utilities included in the taxed class, the petitioner and other street railroad companies being compelled to do business on a far lower margin of profit than other utilities within the taxed class not because of inferior management but because of essential differences in the character of the respective businesses. Pursuant to said opinion an order was made by said Supreme Court of the State of New York, at Special Term, on January 14, 1937, denying said motion.

From said order of the Supreme Court of the State of New York denying the said motion, the defendant-appellee took an appeal to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department. That Court, by order made and entered on May 21, 1937, affirmed said order without opinion, and thereafter, on motion of said defendant-appellee, and by order made and entered on June 1, 1937, the said Appellate Division of the Supreme Court of New York, First Judicial Department, granted said defendant-appellee leave to appeal to the Court of Appeals of the State of New York, and certified to that Court the question: "Does the complaint herein state facts sufficient to constitute a cause of action". Said appeal was argued in said Court of Appeals on the 10th day of June, 1937, and on July 13, 1937, said Court of Appeals by its remittitur of said date ordered and adjudged that the said orders of the Special Term and of the Appellate Division of the Supreme Court of the State of New York be reversed and the complaint dismissed with costs in all courts, and it answered the question certified in the negative. It further ordered by its said remittitur that the [fol. 113] record and proceedings in said Court of Appeals

be remitted to said Appellate Division of the Supreme Court, there to be proceeded upon according to law.

Thereafter, on or about the 4th day of August, 1937, the said Appellate Division of the Supreme Court of the State of New York made and entered an order directing that the order and judgment of the Court of Appeals be made its order and judgment, and thereafter, on the 9th day of August, 1937, a final judgment was entered in the office of the Clerk of the Supreme Court, New York County, dismissing the complaint herein upon the ground that it failed to state facts sufficient to constitute a cause of action. Thereafter, on motion of the appellee, said judgment was resettled, to correct certain formal omissions, by order of said Supreme Court made on August 11, 1937, and entered on August 12, 1937.

The decision of the Court of Appeals of the State of New York was based upon an opinion written by Judge Finch, in which five other Judges concurred, and said opinion shows that the said Court of Appeals determined that the complaint stated a cause of action for recovery of the taxes in question if the Local Laws in question were unconstitutional as applied to your petitioner, but that the said Local Laws were valid as applied to your petitioner, notwithstanding the various grounds, as stated in the complaint, upon which your petitioner contended that they violate the Constitution of the United States.

The Court of Appeals of the State of New York is the highest Court of said State in which a decision in this action can be had.

The question as to whether or not the complaint in this action states a cause of action depends upon whether or [fol. 114] not the aforesaid Local Laws of the City of New York are, as alleged in the complaint, repugnant to the Constitution of the United States, and the said Court of Appeals decided in favor of their validity notwithstanding your petitioner's contention that said Local Laws violate Section 10 of Article 1 of the Constitution of the United States and Section 1 of the Fourteenth Amendment to said Constitution.

In accordance, therefore, with Sec. 237(a) of the Judicial Code, and in accordance with the Rules of the Supreme Court of the United States, your petitioner respectfully shows this Court that the cause is one in which, under the

legislation in force when the Act of January 31, 1928 was passed, to wit, under Sec. 237(a) of the Judicial Code, a review could be had in the Supreme Court of the United States under a writ of error, as a matter of right.

The errors upon which your petitioner claims to be entitled to an appeal are more fully set forth in the assignment of errors filed herewith pursuant to Rules 9 and 46 of the Rules of the Supreme Court of the United States; and there is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States as provided by Rules 12 and 46 of said Rules.

Wherefore, your petitioner prays for the allowance of an appeal from the Supreme Court of the State of New York, which has possession of the record of all proceedings herein, and wherein was entered said final judgment dismissing the complaint herein, to the Supreme Court of the United States, in order that the decision of the said Court of Appeals and the final judgment of the Supreme Court of the State of New York (as resettled by said order of August 11, 1937) entered pursuant thereto may be examined and reversed, and also prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the State of New York, under his hand and the seal of said Court may be sent to the Supreme Court of the United States as provided by law, and that an order be made touching the security to be required of the petitioner, and that the bond tendered by the petitioner be approved.

Dated August 24, 1937.

New York Rapid Transit Corporation, Appellant, by
Paul D. Miller, George D. Yeomans, its Attorneys,
Office and Post Office Address: 385 Flatbush Avenue Extension, Borough of Brooklyn, City and State of New York.

[fol. 116] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS

The appellant, above named, assigns the following errors in the record of proceedings in this cause:

The Court of Appeals of the State of New York erred:

1. In holding that Local Law No. 21 of 1934, as amended, and Local Law No. 30 of 1935, of the City of New York, do not deny to appellant the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.
2. In refusing to hold, in accordance with the contention made by appellant, that the said Local Laws violate the [fol. 117] equal protection clause of the Fourteenth Amendment to the Constitution of the United States in that the tax purported to be imposed by said laws upon appellant and other utility corporations is one to raise money, not for the general support of government, but for a special and limited purpose, no more related to those taxed by said laws than to others, and in that no such heavy tax for said purpose is imposed by any law of the City or State of New York upon corporations other than utility corporations, although there is no difference between the latter and other corporations which bears any relation to the stated object for which the tax is imposed and therefore no reasonable basis for a classification whereby utility corporations are taxed far more heavily for said purpose than are corporations engaged in other forms of business.
3. In refusing to hold, in accordance with the contention made by appellant, that said Local Laws violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States in that they involve palpably hostile discrimination against the appellant and other utility corporations, it appearing from the amended complaint that ordinary business corporations are taxed, for the purpose of raising money for unemployment relief, at the rate of only 1/10 of 1% of their gross receipts from business conducted within the City of New York in excess of \$15,000.00, while utilities, as defined in said Local Laws,

are taxed thereunder for that purpose at the rate of 3% of their gross income from all sources, without any deduction, so that the latter, including appellant, are taxed on their gross incomes at a rate more than 3000% in excess of that at which ordinary business corporations are taxed for a purpose no more related to the one group than to the other.

[fol. 118] 4. In refusing to hold, in accordance with the contention made by appellant, that said Local Laws violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States in that there is no reasonable basis for taxing appellant and other street railroad corporations for the purpose of unemployment relief at a rate more than thirty times as high as the rate at which ordinary business corporations are taxed for that purpose, even if there be a reasonable basis for so taxing utility corporations other than street railroad corporations, it appearing from the amended complaint that appellant and other corporations operating street railroads within the City of New York do not have the protection against competition or other advantages which other utility corporations have and which were cited by the Court of Appeals in *New York Steam Corporation vs. City of New York*, 268 N. Y. 137, as affording a reasonable basis for the imposition of a tax on utilities not imposed on ordinary business corporations, since appellant and other corporations engaged in the business of operating street railroads in the City of New York do meet with serious competition from the construction and operation of street railroads by the appellee itself without the necessity of obtaining from the Transit Commission a Certificate of Convenience and Necessity therefor and without any supervision or control by either division of the Department of Public Service and since also appellant does not have the chief advantage enjoyed by other utilities of always being assured a fair return on its capital investment, being limited to a fixed rate of fare by contract with the appellee itself from which appellant can obtain no release and of which the appellee had knowledge at the time when said Local Laws, arbitrarily classifying street railroad corporations with other utilities, were adopted.

[fol. 119] 5. In refusing to hold, in accordance with the contention made by appellant, that said Local Laws violate the equal protection clause of the Fourteenth Amendment to

the Constitution of the United States in that the tax therein provided for is measured by a percentage of gross income and applied to a group of corporations, the respective businesses of which are essentially different in character, yielding widely differing ratios of profit, the result being that gross inequalities are produced in the distribution of the tax burden, appellant and all other street railroad corporations being taxed by said Local Laws for the purpose of unemployment relief far more heavily upon their net incomes than other utilities within the taxed class, their operating and maintenance expenses being far higher, and their net income far lower in proportion to gross income, than those of such other utilities, and there being no reasonable basis for requiring a street railroad corporation to contribute a greater percentage of its net income for relief of unemployment than is required of utilities within the taxed class other than street railroad corporations.

6. In holding that said Local Laws do not deprive appellant of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

7. In refusing to hold, in accordance with the contention made by appellant, that said Local Laws deprive appellant of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, in that the money exactions levied upon appellant by said Local Laws are not for the general support of the government and hence are not taxes, but an expropriation of money from one group for the benefit of another, which such [fol. 120] expropriation cannot be sustained as part of any plan of regulation since, under the allegations of the amended complaint, utilities have no special relation to or responsibility for the situation which the proceeds of the exactions are designed to alleviate and do not receive any special benefit from the money expended therefor.

8. In holding that said Local Laws do not impair the obligation of the contract, known as "Contract No. 4", between appellant and appellee in violation of Section 10 of Article I of the Constitution of the United States.

9. In refusing to hold, in accordance with the contention made by appellant, that said Local Laws, in violation of Section 10 of Article I of the Constitution of the United States,

impair the obligation of the contract, known as "Contract No. 4", between the appellant and the appellee by which the appellee leased rapid transit railroads of its own to appellant for pooled operation with railroads belonging to appellant, which contract specifies the manner of disposition of all gross income from operation of the combined system and which does not provide for or contemplate the deduction from such gross income of the taxes levied by said Local Laws.

Wherefore, on account of the errors hereinabove assigned, appellant prays that said judgment of the Supreme Court of the State of New York, dated August 9, 1937, as resettled by order of said court made on August 11, 1937, and entered on August 12, 1937, in the above entitled cause, be reversed, and judgment entered in favor of appellant.

Dated August 24, 1937.

New York Rapid Transit Corporation, Appellant,
by Paul D. Miller, George D. Yeomans, Its Attorneys,
Office and Post Office Address: 385 Flatbush
Avenue Extension, Borough of Brooklyn, City &
State of New York.

[fol. 121] Citation, in usual form, showing service on Paul Windels, omitted in printing.

[fols. 122-126] Bond on Appeal for \$500.00, approved, omitted in printing.

[fol. 127] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER AS TO CONTRACT No. 4

It appearing that in the above-entitled cause it is necessary or proper that a certain original document should be inspected in the Supreme Court of the United States upon the appeal in said cause and should be sent up to said Court in lieu of printed copies thereof; and it further appearing that the contract between the appellee and The New York Municipal Railway Corporation, predecessor of appellant, dated March 19, 1913, known as "Contract No.

4", cited in the short-form order of Steuer, J., dated January 14, 1937, was read upon, and made a part of the record in connection with, the motion of appellee to dismiss the amended complaint, and that said "Contract No. 4" was, pursuant to stipulation of the parties and the order of the Appellate Division of the Supreme Court of the State of New York dated March 3, 1937, omitted from the printed record on the appeal by appellee to said Appellate Division from the order of the Supreme Court of the State [fol. 128] of New York denying appellee's motion to dismiss the amended complaint and on the appellee's appeal to the Court of Appeals of the State of New York from the order of said Appellate Division affirming said first mentioned order, "without prejudice to the rights of either party on . . . any appeal to refer to said contract in briefs and upon argument, or to submit the original to the Appellate Court or Courts with the same force and effect as if printed" in the record; it is therefore, upon the annexed consent of the parties hereto,

Ordered that a copy of "Contract No. 4", which was filed in the Court of Appeals of the State of New York, shall be filed with the Clerk of the Supreme Court of the State of New York, New York County, and that the copy so filed shall be transmitted by said Clerk to the Supreme Court of the United States at the same time as the certified transcript of record on appeal herein; that said copy of "Contract No. 4" shall not be printed in the record on appeal but shall be sent up to the Supreme Court of the United States in lieu of printed copies thereof, and returned after disposition of the appeal to the Clerk of the Supreme Court of the State of New York, New York County; and that said "Contract No. 4" may be referred to in the briefs and on the argument and shall be deemed to be a part of the record as if the same had been printed therein.

Dated: August 24, 1937.

Frederick E. Crane, Chief Judge of the Court of Appeals of the State of New York.

Entry of the foregoing order is hereby consented to.

Dated: August 16, 1937.

Paul D. Miller, George D. Yeomans. Attorneys for Appellant. (P. B.) Paul Windels, Corporation Counsel, attorney for Appellee.

[fol. 129] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD

It is Hereby Stipulated and Agreed by and between counsel for the respective parties hereto; that the following are the only necessary papers in this action to be included in the transcript of the record to be certified and filed with the Clerk of the Supreme Court of the United States:

1. The entire record in the Court of Appeals.
2. Remittitur of the Court of Appeals, dated July 13, 1937.
3. Opinion of the Court of Appeals.
4. Order of the Appellate Division of the Supreme Court of the State of New York, dated August 4, 1937, making the order and judgment of the Court of Appeals its order and judgment.
5. Judgment of the Supreme Court of the State of New York, dated August 9, 1937.
- [fol. 130] 6. Order of the Supreme Court of the State of New York, dated August 11, 1937, resettling said judgment.
7. Petition for allowance of appeal.
8. Assignment of errors.
9. Order allowing appeal.
10. Bond on appeal.
11. Statement under Rule 12 of Rules of United States Supreme Court.
12. Proof of service of petition for appeal, assignment of errors, statement under Rule 12 and order allowing appeal, together with a statement calling appellee's attention to Par. 3 of Rule 12.
13. Citation on appeal, with proof of service.
14. Order as to Contract No. 4.
15. This stipulation.

Dated: August 24, 1937.

Paul D. Miller, George D. Yeomans, attorneys for
Appellant. (Sgd.) (P. B.) Paul Windels, attorney
for Appellee.

[fol. 131] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 132] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION
AS TO PRINTING RECORD—Filed September 18, 1937

Comes Now the appellant, pursuant to Paragraph 9 of Rule 13 of the Rules of this Court, and adopts its assignment of errors as its statement of points to be relied upon, and represents that the whole of the record, as filed, is necessary for the consideration of said points.

Dated September 14, 1937.

George D. Yeomans, Harold F. Warner, Henry Root Stern, Paul D. Miller, attorneys for Appellant.

Service of copy of the foregoing is acknowledged this 14 day of September, 1937.

Paul Windels, attorney for Appellee, Municipal Building, Borough of Manhattan, New York City, N. Y.

[fol. 132½] A copy of the within paper has this day been received at the office of the Corporation Counsel, Aug. 26, 1937. Paul Windels, Corporation Counsel.

[fol. 133] [File endorsement omitted.]

Endorsed on cover: File No. 41,916. New York Supreme Court. Term No. 435. New York Rapid Transit Corporation, appellant, vs. The City of New York. Filed September 18, 1937. Term No. 435, O. T., 1937.

(2666)

INDEX.

SUBJECT INDEX.

	Page
Statement as to jurisdiction.....	1
Statutory basis of the jurisdiction.....	1
State statutes the validity of which is involved..	2
Date of the judgment sought to be reviewed and date of the application for appeal.....	3
Nature of the case and rulings below.....	3
Record in possession of Supreme Court of the State of New York.....	5
Cases believed to sustain the jurisdiction.....	9
The questions sought to be reviewed herein have not been foreclosed by prior decisions of the Supreme Court of the United States.....	9
Exhibit "A"—Opinion of the Court of Appeals of the State of New York.....	15

TABLE OF CASES CITED.

<i>Brooklyn Bus Corp. v. City of New York</i> , 274 N. Y. 140.....	14
<i>Chamberlin v. Andrews, etc.</i> , 299 U. S. 515.....	9
<i>Chicago, R. I. & Pac. Ry. v. Perry</i> , 259 U. S. 548.....	9
<i>Colgate v. Harvey</i> , 296 U. S. 404.....	11
<i>Continental Inc. Co. v. Smrha</i> , 131 Nebr. 791, 270 N. W. 122.....	12
<i>Edye v. Robertson</i> , 112 U. S. 580.....	13
<i>Home Ins. Co. v. Dick</i> , 281 U. S. 397.....	9
<i>J. W. Perry Co. v. Norfolk</i> , 220 U. S. 472.....	14
<i>Louisiana v. Merchants' Insurance Co.</i> , 12 La. An. 802.....	12
<i>Lowry v. City of Clarksdale</i> , 154 Miss. 155, 122 So. 195.....	12
<i>Merchants Refrigerating Co. v. Taylor</i> , 275 N. Y. 113	11
<i>Nashville, etc., Ry. v. White</i> , 278 U. S. 456.....	9
<i>New York Rapid Transit Corp. v. City of New York</i> , 275 N. Y. 258.....	7

	Page
<i>Nor. Car. R. R. Co. v. Zachary</i> , 232 U. S. 248.....	9
<i>Puget Sound Power & Light Co. v. Seattle</i> , 291 U. S. 619.....	13
<i>Rickert Rice Mills v. Fontenot</i> , 297 U. S. 110.....	13
<i>Royster Guano Co. v. Virginia</i> , 253 U. S. 412.....	12
<i>Senior v. Braden</i> , 295 U. S. 422.....	9
<i>Stebbins v. Riley</i> , 268 U. S. 137.....	11
<i>Stewart Dry Goods Co. v. Lewis</i> , 294 U. S. 550.....	10
<i>United States v. Butler</i> , 297 U. S. 1.....	13
<i>United States v. La Franco</i> , 282 U. S. 568.....	13
<i>Valentine v. Great Atlantic & Pacific Tea Co.</i> , 299 U. S. 32.....	10

STATUTES CITED.

Constitution of the United States, Article I, Section 10.....	3
Constitution of the United States, 14th Amendment.....	3, 11
Judicial Code, Section 237a, as amended by the Act of February 13, 1925 (28 U. S. C. 344a).....	1
Laws of the State of New York of 1934, Chapter 873.....	2
Laws of the State of New York of 1935, Chapter 601.....	2
Local Laws of the City of New York of 1934, Local Law No. 21, as amended by Local Law No. 2, of 1935, and Local Law No. 30 of 1935.....	2, 3

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 435

NEW YORK RAPID TRANSIT CORPORATION,

Appellant,

vs.

THE CITY OF NEW YORK,

Appellee.

**ON APPEAL FROM THE SUPREME COURT OF THE STATE OF
NEW YORK.**

STATEMENT OF JURISDICTION.

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, appellant submits herewith its statement showing the basis of the jurisdiction of the Supreme Court of the United States to entertain the appeal in the above entitled cause:

1. The appeal is authorized by Section 237 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C., Title 28, Sec. 344 (a)).

2. The statutes, the validity of which is involved, are Local Laws of the City of New York known as Local Law No. 21 of 1934, as amended by Local Law No. 2 of 1935 (set forth in full as Exhibit C to the amended complaint), and Local Law No. 30 of 1935 (set forth in full as Exhibit D to the amended complaint). These Local Laws were purportedly enacted by the Municipal Assembly of the City of New York under authority granted, respectively, by Acts of the Legislature of the State of New York known as Chapter 873 of the Laws of 1934 (set forth in full as Exhibit A to the amended complaint) and Chapter 601 of the Laws of 1935 (set forth in full as Exhibit B to the amended complaint), which Acts, together, during the period from August 18, 1934, to July 1, 1936, empowered the City of New York to adopt and amend local laws imposing any tax or taxes which said Legislature itself could impose, to relieve the people of said City from the hardships and suffering caused by unemployment.

Local Law No. 21 of 1934, as amended by Local Law No. 2 of 1935, purports to impose upon every utility (as therein defined) doing business in the City of New York and subject to the supervision of either division of the Department of Public Service, an excise tax for the privilege of exercising its franchise or franchises, or of holding property, or of doing business in the City of New York, during the calendar year 1935, or any part thereof, equal to three per centum (3%) of its gross income for the calendar year 1935. It is entitled "A Local Law to relieve the people of the City of New York from the hardships and suffering caused by unemployment and the effects thereof on the public health and welfare, by imposing an excise tax on the gross income of every person doing business within such city and subject to supervision of either division of the department of public service, and of any and all other utilities doing business

within such city to enable such city to defray the cost of granting unemployment, work and home relief."

Said Local Law provides that all revenues and moneys resulting from the imposition of the taxes thereby imposed shall not be credited or deposited in the general fund of the City but shall be deposited in a separate bank account or accounts, and shall be available and used solely and exclusively for the purpose of relieving the people of the City of New York from the hardships and suffering caused by unemployment, including the repayment of moneys borrowed for such purpose.

Said Local Law No. 30 of 1935 is entitled in the same manner as said Local Law No. 21 of 1934, as amended, and it is substantially in all respects the same in its provisions as said Local Law No. 21 of 1934, as amended, except that it imposes the tax for the period from January 1, 1936, to June 30, 1936.

3. The judgment sought to be reversed was entered on August 9, 1937, and was resettled, on motion of the appellee, on August 11, 1937. The date upon which the application for appeal is presented is August 24, 1937.

4. This action was brought to recover the amounts of taxes collected by the City of New York from the appellant under the said Local Laws, and paid by appellant under duress and protest, on the ground that the said Local Laws are repugnant to the Constitution of the United States.

The amended complaint alleges that said Local Laws contravene Section 1 of the Fourteenth Amendment to the Constitution of the United States and Section 10 of Article 1 of said Constitution, because, among other reasons—

(A) they deny to appellant equal protection of the law, in that, *inter alia*,

(a) the taxes levied thereby are measured by a percentage of gross income and applied to a group of

corporations, the respective businesses of which are essentially different in character, yielding widely differing ratios of profits, the result being that gross inequalities are produced in the distribution of the tax burden, the appellant and all other street railroad corporations doing business in the City of New York being taxed far more heavily upon their respective net incomes than other utilities in the taxed class,

- (b) appellant and other street railroad corporations doing business in the City of New York do not have protection against competition which other utilities, subject to said Local Laws, have, and appellant does not have the advantage enjoyed by other utilities in the taxed class of being assured a fair return on its capital investment since it is limited to a fixed rate of fare by contract with the appellee itself, from which no release can be obtained by appellant,
 - (c) the object of said Local Laws is not to raise revenues for the general support of the government but to raise money for a specific purpose and there is no difference between utilities and other businesses which bears any relation to said purpose which justifies a classification by which utilities are taxed for said purpose far more heavily than other businesses, and
 - (d) the imposition of a tax to be used solely for unemployment relief upon utilities at a rate more than 3,000% in excess of the rate at which other businesses are taxed for said purpose constitutes hostile discrimination against utilities;
- (B) they deprive appellant of its property without due process of law in that the money exactions levied upon appellant thereby are not for the general support of the government and hence are not taxes, but an expropriation of money from one group for the benefit of

another, which expropriation cannot be sustained as part of any plan of regulation since, under the allegations of the amended complaint, utilities have no special relation to or responsibility for the situation which the proceeds of the exactions are designed to alleviate and do not receive any special benefit from the money expended for such purposes; and

- (C) they impair the obligation of the contract between the appellant and the appellee by which the appellee leased rapid transit railroads of its own to appellant for pooled operation with railroads belonging to appellant, which contract specifies the manner of disposition of all gross income from operation of the combined system, and which does not contemplate the deduction from such gross income of the taxes imposed by said Local Laws.

The appellee, the City of New York, moved to dismiss the amended complaint on the ground that it failed to state facts sufficient to constitute a cause of action and on the further ground that the court had no jurisdiction of the action. Said motion thus drew into question the validity of the said Local Laws. The Supreme Court of the State of New York at Special Term, Part III thereof, where the motion was originally heard, held that the court had jurisdiction of the action and denied said motion on the ground that the amended complaint sufficiently showed that the said Local Laws denied to the appellant the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States. The opinion of the Special Term Justice of the Supreme Court who decided said motion and denied the same states:

"Additional facts are alleged from which conclusions are drawn as to the validity of the local laws. Certain

of these claims are set forth in various forms, but analysis reduces them to the following: The tax being on gross income is improper because it is ruinous and because it creates inequality; the tax places a greater burden on one group of taxpayers, the utilities, than on others; the tax is improper in that it is imposed upon some engaged in transportation and not others; that the method of defining utilities in the local law is unfair thereby making an improper classification; and, particularizing, the plaintiff differs from the other utilities in that it is prevented by contract from increasing its rates and cannot pass the effect of the tax on to its consumers.

"Investigating these in order it will be seen from the foregoing that the weight of the burden of the tax does not affect its validity. The point of inequality is factually supported. Plaintiff does business on a shorter margin of profit than many of the other persons subject to the tax. The consequent result is that the percentage of plaintiff's profit taken by the tax exceeds that taken from the others in the same group. It is shown that this difference amounts in at least one instance to 300 per cent. It is further alleged that this discrepancy comes about not through different methods of management or the like, but because of the essential differences in the nature of the business conducted by the two utilities. Exact equality is not required of a tax (*Clark v. Titusville*, 184 U. S., 329). Nor is there anything inherently improper in a tax on gross receipts (*Metropolis Theatre Co. v. Chicago*, 228 U. S., 61). Where, however, gross inequality is effectuated by the definition of the class to be taxed, the tax must fail (*Stewart Dry Goods Co. v. Lewis*, 294 U. S., 550). On this point the allegations of the complaint are sufficient. * * * (97 N. Y. L. J. 241; 251 App. Div. —.)

The order of the Supreme Court of the State of New York denying said motion to dismiss the amended complaint was made on January 14, 1937 and entered on January 15, 1937.

On appeal by the appellee, the City of New York, from

said order denying the motion to dismiss the amended complaint, said order was affirmed without opinion by the Appellate Division of the Supreme Court of the State of New York by order made and entered on May 21, 1937. Before said Appellate Division the appellant contended that said Local Laws were unconstitutional as to it not only upon the ground upon which they were held invalid, upon the allegations of the amended complaint, by the said Supreme Court at Special Term but also upon the other grounds alleged in the amended complaint.

On motion of appellee, and by order entered June 1, 1937, the said Appellate Division of the Supreme Court of the State of New York granted appellee leave to appeal to the Court of Appeals of the State of New York from its order affirming said order of said Supreme Court at Special Term, and certified to said Court of Appeals the question: "Does the complaint herein state facts sufficient to constitute a cause of action." Before said Court of Appeals the appellant contended that said Local Laws were unconstitutional not only upon the ground upon which they were held invalid, upon the allegations of the amended complaint, by the Special Term and the Appellate Division of said Supreme Court but also upon the other grounds alleged in the amended complaint. Said Court of Appeals held that the court had jurisdiction of the action and that the amended complaint stated a cause of action if said Local Laws violated the Constitution of the United States but it held that said Local Laws did not violate said Constitution. A copy of the opinion of said Court of Appeals is attached hereto and made a part hereof as Exhibit A (see 275 N. Y. 258).

On July 13, 1937, said Court of Appeals made and entered its remittitur by which it ordered and adjudged that the said orders of the Special Term and of the Appellate Division of the Supreme Court be reversed and that the amended

complaint be dismissed with costs in all courts, and answered the question certified in the negative. Said Court of Appeals ordered and adjudged that the amended complaint be dismissed on the ground that it failed to state facts sufficient to constitute a cause of action since, it held, the said Local Laws were valid as applied to appellant and did not violate the Constitution of the United States. Said Court of Appeals by its said remittitur ordered that the record and all proceedings herein be remitted to the Appellate Division of the Supreme Court of the State of New York, there to be proceeded upon according to law.

The said Court of Appeals is the highest court of the State of New York.

By order made and entered on August 4, 1937 said Appellate Division of the Supreme Court of the State of New York directed that the order and judgment of said Court of Appeals be made its order and judgment, and thereupon and pursuant thereto, on the 9th day of August, 1937, a final judgment was entered in the office of the Clerk of the Supreme Court of the State of New York, New York County, finally determining the action by a dismissal of the amended complaint. Thereafter, upon motion of the appellee, said judgment was resettled, so as to correct certain formal omissions but in no other respect changing it, by order of said Supreme Court made on August 11, 1937 and entered on August 12, 1937.

The said judgment is a final judgment and was entered as a result of a decision by the Court of Appeals, the highest court of the State of New York, which decision turned upon the question as to whether or not the Local Laws of the City of New York above mentioned were repugnant to the Constitution of the United States, and the decision of said Court of Appeals was in favor of their validity. The action is thus one in which an appeal lies to the Supreme Court of the United States as a matter of right.

5. Said record of the proceedings herein is now with the Supreme Court of the State of New York.

6. The following decisions are believed to sustain the jurisdiction of this Court: *Nashville, etc., Ry. v. White*, 278 U. S. 456; *Home Ins. Co. v. Dick*, 281 U. S. 397, 407; *Chicago, R. I. & Pac. Ry. v. Perry*, 259 U. S. 548, 551; *Senior v. Braden*, 295 U. S. 422; *W. H. H. Chamberlin, Inc. v. Andrews, Industrial Commissioner*, 299 U. S. 515; *Nor. Car. R. R. Co. v. Zachary*, 232 U. S. 248, 257.

7. The questions sought to be reviewed herein have not been foreclosed by prior decisions of the Supreme Court of the United States.

The amended complaint alleges that the operating expenses of street railroad corporations, such as appellant, are far higher in proportion to gross receipts than the operating expenses of all other corporations included within the class taxed by said Local Laws; that the ratio of net income to gross receipts is far higher in the case of all other types of utilities within the taxed class than in the case of appellant or any other street railroad corporation included therein; that said Local Laws impose a tax measured by a percentage of gross income upon a class which includes corporations the respective businesses of which are so essentially different in character that the ratio of net income to gross income in the case of one is radically less than in the case of another, the result being that said Local Laws produce gross inequality in the distribution of the tax burden within the taxed class itself, taxing some members thereof far more heavily than others on the value of the privilege taxed, so that plaintiff and all other street railroad corporations are taxed far more heavily upon their respective net incomes than other utilities within the taxed class.

No case has been found in which this Court has sustained under the equal protection clause of the Fourteenth Amendment a State tax on gross income as applied to a class of corporations the respective businesses of which are essentially different in character and yield widely varying ratios of profit. On the contrary, in *Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550, the Court held that a graduated tax on gross receipts imposed as a license tax on all retail merchants was unconstitutional, under the Fourteenth Amendment, because of the gross inequalities which the evidence showed resulted therefrom, it appearing that companies with large gross incomes had less net income than companies with smaller gross incomes, that the ratio of net income to gross varied with the character of the business as well as its volume. The Court there said that if a State "desires to tax incomes it must take the trouble equitably to distribute the burden of the impost". See also *Valentine v. Great Atlantic & Pacific Tea Company*, 299 U. S. 32.

Apart from the foregoing, the inclusion of appellant in the taxed class was unreasonable, and in violation of said equal protection clause, because, as alleged in the amended complaint, appellant and other street railroad corporations operating in the City of New York, do not have protection against competition which other utility corporations have (since appellant meets with serious competition from the operation of street railroads by the appellee itself, without any supervision or control by either division of the Department of Public Service) and since appellant does not have the advantage enjoyed by other utilities of being assured of a fair rate of return on its capital investment since it is limited to a fixed rate of fare by contract with the appellee itself from which no release can be obtained by appellant. Recently, the New York Court of Appeals

itself held the Local Laws in question invalid as to a cold-storage warehouse corporation on the ground that such corporation does not possess the essential characteristics of a utility. *Merchants Refrigerating Co. v. Taylor*, 275 N. Y. 113.

The taxes in question are not for the support of the Government but are to be used exclusively for the purpose of unemployment relief. The amended complaint alleges that utilities are no more responsible for or related to the problem of unemployment relief than other businesses, that utilities receive no special benefit from the taxes in question and that the proceeds thereof are to be used for a purpose which is of equal concern to all and which benefits the persons and corporations so taxed no more, in proportion to wealth, property or income, than any other person or corporation doing business in the City of New York. The Supreme Court has repeatedly stated that classification for purposes of taxation must rest upon some real ground of distinction which has a substantial relation to the object of the legislation. " * * * the classification itself [must] be rested upon some ground of difference having a fair and substantial relation to the object of the legislation." (*Stebbins v. Riley*, 268 U. S. 137, 142; see also *Colgate v. Harvey*, 296 U. S. 404, 423). The declared object of this legislation was the relief of suffering caused by unemployment and there are, under the allegations of the amended complaint and as a matter of judicial notice, no differences between utilities and other businesses as related to such object which would justify the taxes here in question. This Court has never held that a State may, within the limits of the Fourteenth Amendment, impose a tax on a narrow class of corporations much in excess of that at which other corporations are taxed, not for the general support of the Government but for a special and

limited purpose no more related to such narrow class of corporations than to corporations and businesses generally. Construing comparable provisions of State constitutions, State courts have held invalid taxes imposed for special purposes not peculiarly related in some fashion to the persons upon whom the taxes were imposed, on the ground that classification for taxation must be grounded upon some distinction which has a substantial relation to the particular object to be accomplished by the law in question. *Lowry v. City of Clarksdale*, 154 Miss. 155, 122 So., 195, 197-198; *Continental Ins. Co. v. Smrha*, 131 Nebr. 791, 270 N. W. 122; *Louisiana v. Merchants' Insurance Co.*, 12 La. An. 802.

The imposition of a tax to be used solely for unemployment relief upon utilities at a rate *more than 3,000% in excess of the rate at which other businesses are taxed* for the same purpose constitutes hostile discrimination against utilities and denies to them the equal protection of the law, in violation of the Fourteenth Amendment. The difference in the rate of the tax is the same as though ordinary businesses were taxed at less than 3% of their gross income and utilities at 90% thereof. In *Royster Guano Co. v. Virginia*, 253 U. S. 412, Mr. Justice Brandeis stated (pp. 417-418) that the Fourteenth Amendment forbids "action attributable to hostile discrimination against particular persons or classes."

The money exactions levied upon appellant by the Local Laws in question are not for the general support of the Government and hence are not properly taxes but are an "expropriation of money from one group for the benefit of another" in violation of the due process clause of the Fourteenth Amendment. Such expropriation cannot be sustained as part of any plan of regulation since, under the allegations of the amended complaint, utilities have no

special relation to or responsibility for the situation which the proceeds of the exaction are designed to alleviate. *United States v. Butler*, 297 U. S. 1, 58, 61. *Rickert Rice Mills v. Fontenot*, 297 U. S. 110, 113; *Edye v. Robertson*, 112 U. S. 580, 595-596; *United States v. La Franca*, 282 U. S. 568, 572.

The amended complaint alleges that the business of appellant is the carrying out of a contract with the appellee itself by which the appellee leased rapid transit railroads of its own to appellant for pooled operation with railroads belonging to appellant, which contract specified the manner of disposal of all gross income from operation of the combined system and which does not provide for the deduction from such gross income of the taxes imposed by said Local Laws. Assuming, for present purposes, that a city, by granting a franchise to a street railroad corporation, does not *ipso facto* divest itself of its general and customary taxing powers in respect of such corporation and does not impliedly agree not to operate a competing business (*Puget Sound Power & Light Co. v. Seattle*, 291 U. S. 619), the said Local Laws impair the obligation of appellant's contract with the appellee, since the taxes imposed thereby call for a payment out of appellant's gross income which was not contemplated by the contract, thereby changing its provisions as to the disposition of gross income to the detriment of appellant, and in effect taxing appellant for the privilege of carrying out the contract. Although, under the contract, the appellee was to be subordinated to certain preferential payments to appellant, by said taxes the appellee completely sets aside such preferential payments for its own benefit. The New York Court of Appeals held that the contract contemplated the deduction from appellant's gross income of "taxes", but the amended complaint alleges that at the time the contract was executed

the appellee had never imposed, and had never had power to impose, taxes of the character here involved. The parties must be deemed to have contracted "according to the terminology and the powers existing at the time" (*Brooklyn Bus Corp. v. City of New York*, 274 N. Y. 140, 147). In determining whether a State statute impairs the obligation of a contract, this Court will determine for itself the meaning of the contract (*J. W. Perry Co. v. Norfolk*, 220 U. S. 472, 479).

Dated August 24, 1937.

Respectfully submitted,

NEW YORK RAPID TRANSIT
CORPORATION,

Appellant,

By PAUL D. MILLER,

GEORGE D. YEOMANS,

Its Attorneys.

Office and Post Office Address:

385 Flatbush Avenue Extension,

Borough of Brooklyn,

City and State of New York.

EXHIBIT "A".

NEW YORK RAPID TRANSIT CORPORATION, *Respondent*,

v.

CITY OF NEW YORK, *Appellant*.

New York Rapid Transit Corp. v. City of New York, 251 App. Div. —, reversed.

Argued June 10, 1937; decided July 13, 1937.

Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered May 21, 1937, which affirmed an order of Special Term denying a motion by defendant for a dismissal of the complaint.

The following question was certified: "Does the complaint herein state facts sufficient to constitute a cause of action?"

Paul Windels, Corporation Counsel (Paxton Blair, Oscar S. Cox, Sol Charles Levine and Meyer Bernstein of counsel), for appellant.

Harold L. Warner, Henry Root Stern, Paul D. Miller and George D. Yeomans for respondent.

J. Osgood Nichols for Thomas E. Murray, Jr., as receiver of Interborough Rapid Transit Company, *amicus curiæ*.

FINCH, J.:

The city of New York appeals from the denial of a motion to dismiss the complaint, affirmed without opinion by the Appellate Division, two justices dissenting, and here by reason of the Appellate Division certifying the question: Does the complaint herein state facts sufficient to constitute a cause of action?

This is an action for money had and received, brought by a transit company to recover taxes paid under protest, upon the ground that the taxing statutes are unconstitutional.

The city of New York, pursuant to enabling acts passed by the State Legislature, which empowered the city to im-

pose any tax or taxes which the Legislature itself could impose, to raise money for unemployment relief, has enacted local laws placing a tax of three per cent on the gross income of all utilities subject to the supervision of either division of the Department of Public Service. (Local Law No. 30, 1935; Local Law No. 21, 1934, as amended by Local Law No. 2, 1935.)

At the outset, the city urges that the complaint should be dismissed on the ground that the remedy by way of action for money had and received is not available since the local laws provide an exclusive remedy for the recovery of illegally collected taxes, whether the illegality of the collection is because of over-assessment, over-valuation, or unconstitutionality. The remedy provided by the local laws furnishes a more expeditious procedure than the action at common law with its six year Statute of Limitations. It requires that all applications for refunds be made within one year of the payment of the tax and that a review by certiorari be applied for within thirty days of the refusal of the Comptroller to grant the refund. (Local Law No. 30, 1935, § 10; Local Law No. 21, 1934, as amended by Local Law No. 2, 1935, § 10.)

The provision on which the city relies applies to applications for refunds when the tax is "erroneously or illegally collected." The city points out that this is not a case where the laws as a whole are void. As applied to other public utilities they are perfectly valid. Only as applied to corporations situated as is the plaintiff is the claim made that they are void. But while it is clear that an exclusive remedy is provided for the recovery of illegal or erroneous exactions of an otherwise valid tax, it is not at all clear that it was intended to apply where the claim is made that the tax itself is void because of unconstitutionality. In view of this ambiguity we cannot construe the laws as depriving the plaintiff of the common law remedy of action for money had and received. (See *Buder v. First Nat. Bank*, 16 Fed. Rep. [2d] 990, 993; certiorari denied, 274 U. S. 743.) Having reached the conclusion that the exclusive remedy provided for by the local law does not apply where it is claimed that the tax is unconstitutional, it becomes

unnecessary to determine whether the powers delegated by the Legislature to the city of New York included the power to provide such an exclusive remedy.

This brings us to the contention that the tax is unconstitutional.

The constitutionality of this statute, in so far as the tax is levied on certain other public utilities, has been upheld. (*New York Steam Corp. v. City of New York*, 268 N. Y. 137; *Garfield v. New York Tel. Co.*, 268 N. Y. 549.) The contention is now made that in so far as the tax is levied on transit companies bound by contract to exact no more than a five-cent fare, it is invalid. This argument has been rejected in the Federal courts (*Southern Blvd. Ry. Co. v. City of New York*, 86 Fed. Rep. [2d] 633; certiorari denied, 301 U. S. —), but that determination, while entitled to great weight, is not binding on this court.

At Special Term the complaint was held invalid on every ground save one, and that presents the major question for decision. To paraphrase that ground as alleged in the complaint, the tax was imposed at the same rate on gross incomes of different types of corporations " * * * which are so essentially different in character that the ratio of net income to gross receipts in the case of one is radically less than in the case of another * * * "

Special Term, after conceding that exact equality is not required of a tax and that there is nothing inherently improper in a tax on gross receipts, sustained the complaint on the ground that " * * * gross inequalities result from that method of taxation, and where this inequality is effectuated by the definition of the class to be taxed, the tax must fail," citing *Stewart Dry Goods Co. v. Lewis* (294 U. S. 550).

The particular inequality and inequity claimed by the plaintiff is that it is arbitrarily classified, and that the burden of the tax does not fall equally on all those within the group—that the transit companies are required to pay a much greater percentage of their profits than other utilities. In other words, the constitutional objection is to the inclusion of corporations with relatively small net earnings under a fixed income tax rate, in a class with corporations

enjoying a ratio of net to gross so radically different as to effect an inequality of burden. Even if so, this does not furnish sufficient reason for declaring a tax invalid where it is imposed upon a group otherwise reasonably classified. Thus in *Alaska Fish Co. v. Smith* (255 U. S. 44), a tax imposed on herring products was held valid although no tax was levied on other fish or fish products. Also taxes imposed upon wholesale dealers in oil and like products, and not on other wholesale dealers (*S. W. Oil Co. v. Texas*, 217 U. S. 114), and taxes upon chain stores (*Tax Commissioners v. Jackson*, 283 U. S. 527), and many like taxes, have been upheld although it is evident that the burden of the tax falls more heavily on some in the classification than on others, whether by reason of low margin of profit, contractual obligations, competition, or other circumstances. The remedy if needed lies not with the judiciary but with the Legislature. (*McCray v. United States*, 195 U. S. 27, 56 *et seq.*)

The tax on gross receipts, which was held unconstitutional in *Stewart Dry Goods Co. v. Lewis* (294 U. S. 550), was a graduated or sliding scale tax on gross receipts, as contrasted with the fixed rate tax in the case at bar, and it was held therein by a majority of the court that there had been "no finding that the relation between gross sales and net profits, or increase of net worth, was constant, or even that there was a rough uniformity of progression within wide limits of tolerance" (p. 559).

The fallacy in the contention that the tax is unconstitutional because it classifies transit companies having a present small margin of profit and contractual inhibition against raising the fare charged by them, with other utilities having much larger margins of profit, is further revealed when we take into consideration that transit companies might have been grouped by themselves and a three percent gross receipts tax imposed while a separate three percent tax was imposed on other utilities. The transit companies could make no valid objection to a tax so imposed. Concerned as we are primarily with substance rather than form, we see no reason for holding a tax on a certain type of utility invalid because it is imposed as part of a general

tax on all utilities, when the same result could have been achieved by taxing various types of utilities under separate classifications.

The plaintiff insists also that the complaint is sufficient upon other grounds denied by the court at Special Term and affirmed by the Appellate Division. The plaintiff argues that the tax in question impairs the obligations of the contract of plaintiff with the city in violation of section 10 of article I of the Federal Constitution. The fact that the transit company, with State sanction, has entered into a contract with the city of New York which provides that it shall not charge more than a five-cent fare, in and of itself does not entitle it to exemption from tax. It has long been established that a grant of a franchise does not carry with it an implied surrender of the power to tax. (*Memphis Gas Light Co. v. Shelby County*, 109 U. S. 398; *St. Louis v. United Rys. Co.*, 210 U. S. 266; *Puget Sound Light & Power Co. v. Seattle*, 291 U. S. 619.).

In *Brooklyn Bus Corp. v. City of New York* (274 N. Y. 140, 147) the contract specifically provided that "any new form of tax or additional charge that may be imposed by any ordinance of the City or resolution of the Board upon or in respect of the franchise * * * shall be deducted from the compensation payable to the City." In that case we held that the contract provision was intended to apply to local laws as well as other forms of additional taxes. The contracts of the transit companies with the city contain no such provision, and no reason appears for reading such a provision into the contracts. The transit companies contracted with the city to provide service at a five-cent fare, and to apportion their gross revenues according to a formula whereby the city and the companies are to share the income, but only after the companies have been paid interest and sinking fund allowances on new moneys invested in the project. Taxes, of course, have priority over such interest and sinking fund payments.

Nevertheless, an attempt is made to argue that the imposition of the tax impairs the obligations of the contract in violation of article I, section 10, of the Federal Constitution because it enables the city to obtain funds out of

the gross income without giving priority to the interest and sinking fund payments. The right to tax cannot be lost by such tenuous implication, and all doubt vanishes when we find that the contract itself makes provision for the deduction of taxes from gross revenues, and refers to "all taxes or other governmental charges of every description (whether on physical property, stock or securities, corporate or other franchises, or otherwise) assessed or which may hereafter be assessed against the lessee in connection with or incident to the operation of the railroad and the existing railroads." There is thus no basis whatever for reading into the above contract any express or implied obligation on the part of the city to surrender its power to tax the privilege granted to the plaintiff under laws either in existence at the time of the contract or thereafter enacted. Nor can any merit be found in the argument that the enabling acts, although general in language, must be construed as not intended to apply to transit companies because of their pre-existing contracts with the city.

Plaintiff further contends that the local laws in question deny plaintiff the equal protection of the laws under the Federal Constitution, in that they classify street railroad corporations and other utilities for taxation at a higher rate than ordinary business corporations for the special purpose of unemployment relief.

No one of the above contentions is well founded. We have already decided that the imposition of a tax on utility companies without imposing a similar tax on other industries and businesses is a valid classification and does not constitute a denial of the equal protection of the laws. (*New York Steam Corp. v. City of New York*, 268 N. Y. 137; *Puget Sound Power & Light Co. v. Seattle*, 291 U. S. 619.)

Likewise the tax is not invalid because imposed upon utilities with the proceeds earmarked for purposes of unemployment relief. In sustaining the imposition upon the processing of cocoanut oil of a tax which Congress declared should "be held as a separate fund and paid to the Treasury of the Philippine Islands" (48 U. S. Stat. 680, 763), the court said: "Standing apart, therefore, the tax is unassailable. It is said to be bad because it is ear-

marked and devoted from its inception to a specific purpose. But if the tax, *qua* tax, be good, as we hold it is, and the purpose specified be one which would sustain a subsequent and separate appropriation made out of the general funds of the Treasury, neither is made invalid by being bound to the other in the same act of legislation." (*Cincinnati Soap Co. v. United States*, 301 U. S. —; 57 Sup. Ct. Rep. 764.)

• Nor may street railroads successfully resist this tax because of alleged competition by city owned subways and by taxicabs, both of which are exempted from this classification. A city's conduct in operating its own subways, and exempting them from taxation, does not render an act unconstitutional. (*Puget Sound Power & Light Co. v. Seattle*, 291 U. S. 619.) Innumerable valid reasons suggest themselves for treating taxicabs differently from transit companies and other utilities. (See *Hicklin v. Coney*, 290 U. S. 169, and cases cited therein.)

Plaintiff further contends that the tax bears so heavily upon it as not to constitute taxation at all, but to amount to a taking of its property without compensation in violation of the due process clause of the Fourteenth Amendment to the Federal Constitution.

Plaintiff seeks to support the above contention through a process of elimination by insisting that these taxes cannot be justified otherwise and hence must amount to a taking of property. As we have heretofore shown, the classification of the utilities and the imposition of these taxes for unemployment relief is not unlawful. Moreover, hardship arising from the burden of taxation or excessiveness does not render invalid an otherwise valid tax. (*Fox v. Standard Oil Co.*, 294 U. S. 87. Cf. *Great Northern A. & P. Co. v. Grosjean*, 301 U. S. —; *Power v. Pennsylvania*, 127 U. S. 678.)

It follows that the orders should be reversed and the complaint dismissed with costs in all courts, and the question certified answered in the negative.

Crane, Ch. J., Lehman, Hubbs, Loughran and Rippey, JJ., concur; O'Brien, J., taking no part.

Orders reversed, etc.

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IN THE
Supreme Court of the United States
October Term, 1937

No. 435

NEW YORK RAPID TRANSIT CORPORATION

Appellant

v.

THE CITY OF NEW YORK

**ON APPEAL FROM THE SUPREME COURT OF THE STATE OF
NEW YORK**

BRIEF FOR THE APPELLANT

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Outline of the Challenged Local Laws and the Under- lying State Enabling Acts	3
Statement	6
Specification of Errors	15
Summary of Argument	16
ARGUMENT	17

POINT I.—The stated object of the Local Laws was to provide a special fund for unemployment relief, and a classification whereby the appellant is taxed for that purpose at a rate 3000% higher than the rate at which business in general is taxed for the same purpose is violative of the Fourteenth Amendment for the reasons that:

- A.
The challenged classification does not rest upon any ground of difference having a fair and substantial relation to the object of the legislation
18
- B.
The classification, from any point of view, constitutes arbitrary, unreasonable and hostile discrimination against the appellant and other street railroad companies operating in the City of New York
35

POINT II.—By reason of inherent differences in the character of the respective businesses, a tax of 3% of gross income applied to a class of corporations which includes street railroad companies along with gas, electric, telephone and other utility companies, results in gross inequalities in the distribution of the tax burden among the members of the taxed class itself and denies to appellant and other street railroad corporations the equal protection of the law, in violation of the Fourteenth Amendment of the Federal Constitution 45

POINT III.—The imposition by the City on appellant of a tax on or measured by its gross income violates and impairs the obligation of Contract No. 4, in violation of Section 10 of Article I of the Constitution 60

A. This Court will determine independently the proper interpretation of Contract No. 4 and whether its obligations have been impaired 61

B. History and outline of Contract No. 4.... 62

C. The City, as a party to Contract No. 4, is as fully bound thereby as appellant, and it is precluded by the contract clause of the Federal Constitution from imposing any tax upon appellant which violates the terms of the contract 70

D. The Local Laws violate the express agreements of the City as to the allocation of the gross receipts of the combined system 73

CONCLUSION 93

TABLE OF CASES

	PAGE
Admiral Realty Co. v. City of New York, 206 N. Y. 110, 99 N. E. 241	62, 69
Air-way Electric Appliance Co. v. Day, 266 U. S. 71....	18
Alaska Fish Co. v. Smith, 255 U. S. 44.....	30
Appleby v. City of New York, 271 U. S. 364	61
Beers v. Glynn, 211 U. S. 477.....	18
Bell's Gap. R. Co. v. Pennsylvania, 134 U. S. 232.....	18
Brooklyn Bus Corp. v. City of New York, 274 N. Y. 140; 8 N. E. (2d) 309	79, 87
Carmichael v. Southern Coal and Coke Company, 301 U. S. 495	20, 33
Chicago v. Sheldon, 9 Wall. 50	89
Cincinnati Soap Company v. U. S., 301 U. S. 308 20, 31, 32	
City of New York v. Interborough R. T. Co., 257 N. Y. 20, 177 N. E. 295	36
Colgate v. Harvey, 296 U. S. 404	18, 28
Continental Insurance Co. v. Smrha, 270 N. W. (Nebr.) 122	25
Crew Levick Co. v. Penn, 245 U. S. 292	55
Cumberland Coal Co. v. Board, 284 U. S. 23.....	53
Cuyahoga Power Co. v. Akron, 240 U. S. 462.....	61
Davis v. Gray, 16 Wall. 203	71
Detroit United Ry. v. Michigan, 242 U. S. 238.....	61
Edye v. Robertson (Head Money Cases), 112 U. S. 580	20
Electric Lines v. Empire City Subway, 235 U. S. 179..	61
Fisk v. Jefferson Police Jury, 116 U. S. 131	72
Gilchrist v. Interborough Co., 279 U. S. 159.....	37, 62, 63
Hale v. Iowa State Board, No. 16, Present Term, dec. Nov. 8, 1937	61, 87

	PAGE
Hall v. Wisconsin, 103 U. S. 5	70
Hartman v. Greenhow, 102 U. S. 672	72
Hopkins v. So. Cal. Tel. Co., 275 U. S. 393	45
Interborough Rapid Transit Co. v. City of New York, 252 App. Div. 94	73
Louisville Gas & E. Co. v. Coleman, 277 U. S. 32	18
Louisville v. Merchants' Insurance Co., 12 La. Ann. 802	25
Lowry v. City of Clarksdale, 154 Miss. 155, 122 So. 195	23, 24
Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283	18, 45, 46
Manners v. Morosco, 252 U. S. 317	92
Matter of McAneny v. Bd. of Estimate, etc., 232 N. Y. 377, 134 N. E. 187	62
Memphis Gas Co. v. Shelby County, 109 U. S. 398....	72
Mercantile Trust Co. v. Columbus, 203 U. S. 311	61
Merchants Bank v. Pennsylvania, 167 U. S. 461	18
Merchants Refrigerating Company v. Taylor, 275 U. S. 113	27, 30
Metropolitan Street Ry. Co. v. New York, 199 U. S. 1	72, 84
Milwaukee Elec. Ry. Co. v. Milwaukee, 252 U. S. 100..	61
Mountain Timber Co. v. Washington, 243 U. S. 219..	81
Murray v. Charleston, 96 U. S. 432	71, 88, 90
Nash v. Towne, 5 Wall. 689	62
Nashville C. & St. L. Ry. v. Walters, 294 U. S. 405....	25
New York Steam Corp. v. City of New York, 268 N. Y. 137; 197 N. E. 172	3, 6, 8, 26, 35, 37, 79
Northern Pacific Railway v. Duluth, 208 U. S. 583.....	61
Ohio Oil Company v. Conway, 281 U. S. 146	18
Pacific Express Co. v. Seibert, 142 U. S. 339	45, 53
Peck & Co. v. Lowe, 247 U. S. 165	55

Index

v

	PAGE
People ex rel. Farrington v. Mensching, 187 N. Y. 8...	28
People ex rel. Garrison v. Nixon, 229 N. Y. 575, 128 N. E. 255	37
People ex rel. Interborough R. T. Co. v. Tax Com'rs., 126 App. Div. 610, 110 N. Y. Supp. 577, aff'd 195 N. Y. 618	80
Perry v. United States, 294 U. S. 330	71
Puget Sound Power & Light Co. v. Seattle, 291 U. S. 619	26, 60, 73
Quaker City Cab Co. v. Penna., 277 U. S. 389	81
Raymond v. Chicago Traction Co., 207 U. S. 20.....	45
Retirement Board v. Alton R. Co., 295 U. S. 330....	25
Robertson v. Miller, 276 U. S. 174.....	72
Rock Island Railway v. Rio Grande Railroad, 143 U. S. 596	62
Royster Guano v. Virginia, 253 U. S. 412	18, 40, 45
St. Paul Gas Light Co. v. St. Paul, 181 U. S. 142....	61
Schlesinger v. Wisconsin, 270 U. S. 230	18
Shaffer v. Carter, 252 U. S. 37	55
Sinking Fund Cases, 99 U. S. 700	70
Southern Boulevard R. Co. v. City of New York, 86 F. (2d) 633	27
State Tax on Foreign-held Bonds, 15 Wall. 300	72
Stebbins v. Riley, 268 U. S. 137	18, 45
Stewart Dry Goods Co. v. Lewis, 294 U. S. 550 45, 50, 51, 52, 56, 59, 81, 82	
S. W. Oil Co. v. Texas, 217 U. S. 114	30
U. S. v. Butler, 297 U. S. 1	32
United States Glue Co. v. Oak Creek, 247 U. S. 321. 55, 81	
Uproar Co. v. National Broadcasting Co., 81 F. (2d) 373	92
Valentine v. The Great Atlantic & Pacific Tea Co., 299 U. S. 32	51, 57
Wells v. Savannah, 181 U. S. 531	72

STATUTES AND CONSTITUTIONAL PROVISIONS

Federal Constitution:	PAGE
Fourteenth Amendment	2
Section 10 of Article I	17, 61
New York Laws of 1891, Ch. 4 (Rapid Transit Act)....	62
New York Laws of 1912, Ch. 222	63
New York Laws of 1933, Ch. 815	3
New York Laws of 1934, Ch. 302	3
New York Laws of 1934, Ch. 873	3, 31
New York Laws of 1935, Ch. 601	3, 31
New York Laws of 1936, Ch. 414	3
New York Laws of 1937, Ch. 321	3
N. Y. Cons. Laws, Ch. 60, Par. 4	78, 84
Local Laws of the City of New York:	
No. 21 of 1934 (amended by Local Law No. 2 of 1935)	4
No. 19 of 1933	6
No. 10 of 1934	6
No. 24 of 1934	39
No. 30 of 1935	5
No. 30 of 1936	6
No. 23 of 1937	6

MISCELLANEOUS

3 Hamilton's Works, 518-519	70
-----------------------------------	----

IN THE
Supreme Court of the United States
October Term, 1937

No. 435

NEW YORK RAPID TRANSIT CORPORATION,
Appellant,

v.

THE CITY OF NEW YORK.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF
NEW YORK

BRIEF FOR THE APPELLANT

Opinions Below

The opinion of the Court of Appeals of the State of New York (R. 62-68) is reported in 275 N. Y. 258 and 9 N. E. (2d) 858. The memorandum decision of the Appellate Division of the Supreme Court of the State of New York (R. 59-60) is reported in 251 App. Div. 710 and 296 N. Y. Supp. 1012. The opinion of the Supreme Court of the State of New York, Special Term (R. 53-57), is not reported.

Jurisdiction

The jurisdiction of this Court is based on § 237 (a) of the Judicial Code as amended (U. S. C., Title 28, § 344 (a)). The judgment sought to be reversed was entered on August 9, 1937 (R. 70-71), and was resettled, on motion of the appellee, on August 11, 1937 (R. 71-73). The appeal was allowed on August 24, 1937 (R. 73-74). The judgment sought to be reviewed is the final judgment of the highest court in which decision could have been had.

The Federal question is as to the validity, under the Federal Constitution, of certain Local Laws of the City of New York. This question was raised *in limine* in the complaint (R. 21-25) and was specifically determined in the opinion of the Court of Appeals (R. 64-68).

Questions Presented

1. Whether the challenged Local Laws deny to appellant the equal protection of the law, in violation of the Fourteenth Amendment.

2. Whether said Local Laws deprive appellant of its property without due process of law, in violation of the Fourteenth Amendment.

3. Whether said Local Laws impair the obligation of Contract No. 4 between appellant and the City of New York, in violation of Section 10 of Article I of the Constitution.

Outline of the Challenged Local Laws and the Underlying State Enabling Acts

By Ch. 873, Laws of 1934 (R. 28-30), the New York Legislature authorized any city of the State with a population of 1,000,000 or more, from August 18, 1934 to December 31, 1935:

"to adopt and amend local laws [effective during the period mentioned] imposing in any such city any tax and/or taxes which the legislature has or would have power and authority to impose to relieve the people of any such city from the hardships and suffering caused by unemployment.* * *",

including (R. 29) "a tax on gross income or a tax on gross receipts of persons, firms and corporations doing business in any such city."

By Ch. 601, Laws of 1935 (R. 30-32), this authority was extended to July 1, 1936.

Both these Acts provided that revenues from the taxes authorized "shall not be credited or deposited in the general fund of any such city but shall be deposited in a separate bank account or accounts and shall be available and used solely and exclusively for the relief purposes for which the said taxes have been imposed under the provisions of this Act."¹

¹ These enabling Acts, which are set forth in full as exhibits to the complaint (R. 28-32), were substantially identical with Ch. 815, Laws of 1933, by which the State Legislature, for the first time in its history, "conferred upon a municipal corporation authority to enter the field of indirect or excise taxation." *New York Steam Corp. v. City of New York*, 268 N. Y. 137, 144; 197 N. E. 172, 174. The original enabling Act was effective only until February 28, 1934, but the power thus delegated to the City was continued until December 31, 1934 by Ch. 302, Laws of 1934, which was in turn followed by the two enabling Acts here involved. Each year since the power so delegated has been extended by a similar Act. Ch. 414, Laws of 1936; cf. Ch. 321, Laws of 1937.

Under the authority thus granted the Municipal Assembly of the City of New York enacted Local Law No. 21 of 1934 (later amended slightly by Local Law No. 2 of 1935), the title of which reads in part as follows (R. 33):

"A Local Law to relieve the people of the City of New York from the hardships and suffering caused by unemployment * * * *by imposing an excise tax on the gross income of every person doing business within such city and subject to supervision of either Division of the Department of Public Service, and of any and all other utilities doing business within such city, to enable such city to defray the cost of granting unemployment, work and home relief.*"²

Section 2 of said Local Law provided (R. 34-35) that:

"Notwithstanding any other provision of law to the contrary, for the privilege of exercising its franchise or franchises, or of holding property, or of doing business in the city of New York, during the calendar year nineteen hundred thirty-five or any part thereof, *every utility doing business in the city of New York and subject to the supervision of either division of the department of public service,* shall pay * * * an excise tax which shall be equal to three percentum of its gross income for the calendar year nineteen hundred and thirty-five * * *. Such tax shall be in addition to any and all other taxes and fees imposed by any other provision of law * * *."

Section 14 thereof, following the legislative mandate, provided (R. 42) that revenues resulting from the tax should not be deposited in the City's general fund but should be deposited in a separate account to be used—

² All italics in quotations herein are ours unless otherwise indicated.

"exclusively for the purpose of relieving the people of the city of New York from the hardships and suffering caused by unemployment, including the repayment of moneys borrowed for such purpose."

By said Local Law the word "utility" was defined to mean (R. 34)—

"any person subject to the supervision of either division of the department of public service and every person whether or not such person is subject to such supervision who shall engage in the business of furnishing or selling to other persons, gas, electricity, steam, water, refrigeration, telephony, and/or telegraphy, * * *",

and the term "gross income" was defined (R. 33-34), in the broadest possible fashion, to include all receipts of cash, credits or property of any kind, and from whatever source received, without deduction on account of the cost of property sold, materials used, labor or services, or other costs, or any other expense whatsoever.

Any "utility" not subject to the supervision of either division of the Department of Public Service was, under said Local Law, subjected to a tax of 3% of "gross operating income," which was broadly defined as including all receipts whatever from the sale of gas, electricity, steam, water, refrigeration, telephony or telegraphy (R. 34, 43-44).

Local Law No. 21 of 1934, as amended, was followed by Local Law No. 30 of 1935, which is entitled in the same manner as its predecessor, and is substantially in all respects the same except that it imposed the tax for the period from January 1, 1936 to June 30, 1936 (R. 42-52).

The taxes sought to be recovered (aggregating \$1,408,-

697, and covering the year 1935 and the first six months of 1936) were imposed under said two Local Laws.³

Statement

This is an appeal from a final judgment of the Supreme Court of the State of New York (R. 70-73), entered pursuant to remittitur of the Court of Appeals of said State (R. 61-62), dismissing appellant's amended complaint (herein referred to as the complaint) on the ground that it does not state facts sufficient to constitute a cause of action.

Appellant sued in the trial court to recover taxes in the aggregate sum of \$1,408,697 exacted from it by the City, the appellee, under purported authority of the Local Laws above described, and paid by it under protest and duress (R. 12-13), on the ground that said Local Laws, as applied to appellant, were repugnant to the Federal Constitution (R. 21-25). The City moved to dismiss the complaint on the ground that it failed to state a cause of action and on the further ground that the court was without jurisdiction (R. 2-3). The Supreme Court of New York, at Special Term, denied the City's motion, holding that the court had jurisdiction of the action, and that upon the allegations of the complaint the Local Laws were invalid as applied to appellant in that they denied to it

³ The two Local Laws here involved, which are set forth in full as exhibits to the complaint (R. 33-52), were preceded by Local Law No. 19 of 1933, which imposed a similar "excise tax" (at a lower rate, however) for the period from September 1, 1933 to February 28, 1934. See *New York Steam Corp. v. City of New York*, 268 N. Y. 137; 197 N. E. 172. This was followed by Local Law No. 10 of 1934, effective from March 1, 1934 to December 31, 1934, which was in turn followed by the two Local Laws here attacked. Thereafter the tax was continued by Local Law No. 30 of 1936; cf. Local Law No. 23 of 1937.

the equal protection of the law in violation of the Fourteenth Amendment (R. 2, 53-57).

On appeal to the Appellate Division the order entered at Special Term was affirmed without opinion (R. 59-60). Thereafter, the Appellate Division granted appellee leave to appeal, and certified to the Court of Appeals the question: "Does the complaint herein state facts sufficient to constitute a cause of action?" (R. 59). The Court of Appeals, in an opinion written by Judge FINCH, held that the trial Court had jurisdiction (R. 63-64) but it sustained the validity of the challenged enactments and consequently held that the complaint did not state facts sufficient to constitute a cause of action (R. 64-68). By its remittitur, said court, answering the question certified in the negative, directed that the orders of the lower courts be reversed, and that the complaint be dismissed with costs (R. 61-62).

In addition to the allegations (R. 7-13, 26-27) setting forth the enactment of the two Enabling Acts (p. 3, *supra*) and the challenged Local Laws (pp. 4-5, *supra*) and showing the payment by appellant, under duress and protest, of taxes imposed by said Local Laws in the amount of \$1,408,697, during 1935 and the first six months of 1936, the complaint contains allegations in substance as follows:

Appellant is a New York corporation whose sole business is the operation in the City of New York of certain rapid transit railroads, some owned by the City and others by appellant, under a contract made by and between the City and appellant's predecessor in title, said contract being known, and herein referred to, as Contract No. 4 (R. 3-4, 6).

Contract No. 4 was signed and delivered on March 19, 1913, pursuant to the Rapid Transit Act (Ch. 4,

N. Y. Laws 1891, as amended) which was in terms made a part of the contract (Art. III, p. 11).⁴ Under said contract, the City agreed to construct certain lines of rapid transit railroad and lease them to appellant's predecessor for 49 years (R. 5-6), as Lessee, and said Lessee agreed to contribute \$13,500,000 toward the cost of construction of said lines of the City plus the cost of construction of a connection between two sections thereof at Canal Street and Broadway in New York City, to equip said lines, to reconstruct and add to its own existing rapid transit railroads so as to adapt them for operation in conjunction with said lines of the City, and to operate the combined railroads for the full term of the contract, as one system, *at a single fare of 5¢ per passenger* (R. 3-4).

In essence, Contract No. 4 (the terms of which are set forth at length in the Argument, *infra*) provides for the pooling of *all gross receipts* from the operation of the combined railroads, from whatever source derived, and then, after deduction of specific charges *and certain preferential payments (first to appellant⁵ and then to the City)*, that the earnings and profits should be *shared equally by appellant and the City* (R. 4-5).

When Contract No. 4 was executed, the City was without power, and had never possessed power, to make laws taxing any corporation for the privilege of holding property, or of exercising its franchise, or of doing business in said City (see *New York Steam*

⁴ Contract No. 4 was made by reference a part of the complaint (R. 4) and was included in the papers upon which the City's motion to dismiss was decided (R. 2). By stipulation of the parties (R. 53) it was not printed in the records in the courts below, and hence it is not printed in the record in this Court. The original copy thereof which was submitted to the Court of Appeals was, by order of the Chief Judge of said Court (R. 82-83), filed with the Clerk of this Court as an original document. Nine copies of the contract have been filed in this Court.

⁵ The word "appellant" is used herein, when required by the context, as including appellant's predecessor in title.

Corp. v. City of New York, 268 N. Y. 137, 144; 197 N. E. 172, 174), and it was not within the contemplation of the parties to said contract that the City ever would or should have the power to make such laws, or to tax appellant for the privilege of carrying out its obligations thereunder (R. 20).

The payments exacted from appellant under the challenged Local Laws, for 1935 and the first half of 1936, in the aggregate sum of \$1,408,697, deprived appellant, during said period, of a substantial part of the interest and sinking fund preferential payments accruing during said period to which it was entitled under Contract No. 4. Appellant's revenues during that period, after deducting the said taxes paid by it, were \$685,292.33 less than enough to pay appellant's said preferential interest and sinking fund charges accruing during said period under Contract No. 4 (R. 19-20).

In addition to the 3% excise tax on the gross income of utilities here involved, the City, acting under the same enabling Acts (described at p. 3, *supra*), imposed, effective during 1935 and the first half of 1936, an excise tax on financial businesses of 1/5 of 1% of all gross income in excess of \$5,000, and an excise tax on businesses generally (other than utilities and financial businesses) of 1/10 of 1% of all gross receipts in excess of \$15,000, derived from business carried on in the City (R. 13-14).

Apart from the aforesaid gross income or gross receipts taxes, the only taxes imposed by the City under said enabling Acts for the purpose of unemployment relief, and effective during the eighteen months' period here involved, were (R. 13-14)—

- (a) a general 2% sales tax, payable by the purchaser, and applicable to utilities as well as others;
- (b) a general 2% tax on certain articles of personal property [in respect of which a sales tax had not

been paid], applicable to utilities as well as to others; and

- (c) an estate transfer tax [which was repealed after it had been in effect only a few months].

The rate of fare which appellant is permitted to charge for transportation of passengers on its railroads is limited to five cents per passenger by the provisions of Contract No. 4. The City has heretofore refused to modify the contract so as to permit any increase in the rate of fare that may be charged by appellant (R. 15).

Neither the Transit Commission nor any other commission or body has the power to increase the rate of fare which appellant may charge for the transportation of passengers beyond the sum of five cents per passenger, and there is no way, without the consent of the City, in which appellant can secure the right to increase its rate of fare and no way in which it can or could have passed on to the public any part of the burden of the taxes collected from it by the City under the provisions of said Local Laws, whereas other corporations, both utilities and businesses generally, are in a position to pass on to the public the burden of such taxes as they may be required to pay by increasing their prices for the goods sold or the services furnished by them (R. 7, 15-16).

At the respective times of enactment of the said Local Laws the City itself was operating rapid transit railroads which were constructed by it subsequent to the construction of the railroads mentioned in Contract No. 4, and which have competed and still do compete directly with the railroads operated by appellant under Contract No. 4. Neither division of the Department of Public Service has any supervision over the railroads thus operated by the City, nor was the City required to obtain from

either division of the Department of Public Service a certificate of convenience and necessity for said railroads before constructing and operating the same. Some of the said railroads run directly parallel to and in the same streets over and along which railroads are operated by appellant. These new railroads operated by the City directly and seriously compete with the railroads operated by appellant under Contract No. 4, causing a substantial loss of income to appellant, and appellant has no protection whatever against such competition (R. 16).

At the time of the passage of said Local Laws upwards of 10,000 taxicabs were licensed and operated, and are now licensed and operating, for the transportation of persons for hire in the City of New York. Although said taxicabs seriously compete with appellant and deprive it of substantial revenues which it would otherwise receive, they are not subject to the Local Laws here challenged, their operation has never been subject to the supervision of either division of the Department of Public Service, and appellant receives no protection against such competition (R. 16-17).

Because of inherent differences in the character of the respective businesses (R. 25), the operating and maintenance expenses of railroad corporations (including appellant) engaged in the operation of subway, elevated or street surface railroads in the City of New York are far higher in proportion to gross receipts than those of other types of businesses within the taxed class and subject to said Local Laws. Moreover, the ratio of net income to gross receipts is far higher in the case of corporations selling gas, electricity, refrigeration, steam, water, telephone service or telegraph service than in the case of appellant or any other street railroad included within the taxed class. As an illustration, the net income for 1935 of Brooklyn-

Edison Company, a corporation selling electricity in the City of New York and subject to supervision by the Department of Public Service was, before deduction of taxes, about 42% of its gross receipts for said year, whereas appellant's net income for that year, before deduction of taxes, was about 19% of its gross receipts; and the net income of Brooklyn and Queens Transit Corporation, a corporation operating street railroads in the City of New York and subject to supervision by the Transit Commission (the appellant in case No. 436), for 1935 was, before deduction of taxes, about 14½% of its gross receipts. Other street railroad corporations doing business in the City, while having substantial gross receipts, were operated at a loss and had no net income, so that the taxes imposed by the Local Laws in question simply added to their deficits (R. 18-19).

Appellant is not engaged in any of the utility businesses specifically mentioned in the challenged Local Laws (see p. 5, *supra*), and was subjected to the tax imposed thereby solely because, being a common carrier engaged in the operation of rapid transit railroads in the City of New York, it is "subject to the supervision of the Transit Commission, one of the two divisions of the Department of Public Service" (R. 6-7, 9, 34, 44).

In addition to the tax here challenged, appellant is required by the New York Tax Law to pay to the State of New York an annual franchise tax "for the privilege of exercising its corporate franchise or holding property," and an additional franchise tax "for the privilege of exercising its corporate franchise or carrying on its business in such corporate or organized capacity." Moreover, appellant is required to pay annually to the City a special franchise tax on the value of its property and its special franchises to use the streets of the City for the operation of its railroads (R. 13, 14-15).

The said Local Laws are unconstitutional, null and void for the following, among other, reasons (R. 21-25):

1. They impair the obligation of Contract No. 4 in violation of Section 10 of Article 1 of the Constitution of the United States (R. 21-22).

2. They deprive appellant and others of property without due process of law in that—

(a) The challenged taxes are measured by a percentage of gross income without regard to the net income of or the ruinous effect upon the persons and corporations purported to be taxed (R. 23).

(b) The persons and corporations purported to be taxed are required to pay the shares of others in the expense of a project which is of equal concern to all and which is no more related to the particular class which is taxed than to business in general (R. 23).

3. They deny to appellant and other corporations the equal protection of the law in that—

(a) Though purporting to impose only emergency taxes for the special purpose of unemployment relief, they arbitrarily single out one small group and tax that group upon the privilege of holding property and doing business within the City of New York at a rate which is 3000% higher than the rate at which businesses generally are taxed for the same purpose, thereby arbitrarily and with hostile design placing a ruinous burden upon a particular group of persons and corporations in an attempt to make them pay far more than their fair share of the cost of emergency relief, there being no sound or reasonable basis for the discrimination against them (R. 23).

(b) The definition of the word "utility" contained in the Local Laws is such as to make the classification unreasonable and void because, except as to the businesses of furnishing or selling gas, electricity, steam, water, refrigeration, telephone service or telegraph service, the character of the business in which any person or corporation may be engaged is not made the test of whether or not such person or corporation is within the taxable class, but the sole test thereof is whether or not such person or corporation is subject to the supervision of either division of the Department of Public Service, regardless of the character of his or its business (R. 24).

(c) Even if there be any reasonable basis for taxing other utilities more heavily than general businesses for the special purpose of unemployment relief, there is certainly no reasonable basis for taxing the appellant and other street railroads more heavily than business in general for that purpose, and it is wholly unreasonable to include the appellant in the same class with gas, electric, telephone and other utility corporations because whereas the latter meet with little or no competition and can protect themselves from the ruination which might otherwise result from excessive taxation by obtaining higher rates for the utility service furnished by them, the appellant meets with substantial competition not only from taxicabs but from the operation of new underground railroads by the City of New York, the taxing authority itself, and, being limited by contract with the City of New York itself to a five cent fare, it is helpless to obtain any increase in the rate of fare which it may charge its passengers and has no way of defending itself against confiscation and ruination resulting from excessive taxation (R. 24-25); and

(d) The said Local Laws impose a tax measured by a percentage of gross receipts upon a class defined in such a way as to include corporations, the respective businesses of which are so essentially different in character that the ratio of net income to gross receipts in the case of one is radically less than in the case of another, the result of which is that said Local Laws produce glaring inequality in the distribution of the tax burden within the taxed class itself, arbitrarily discriminating in favor of some and against other members of the class and taxing some far more heavily than others on the value of the privilege taxed (R. 25).

Specification of Errors

The appellant urges all of the assigned errors set forth in the record (R. 79-82) which may be summarized as follows:

The Court of Appeals erred—

(1) In holding that the challenged Local Laws do not deny to appellant the equal protection of the law, in violation of the Fourteenth Amendment (R. 79-81).

(2) In holding that said Local Laws do not deprive appellant of its property without due process of law, in violation of the Fourteenth Amendment (R. 81).

(3) In holding that said Local Laws do not impair the obligation of Contract No. 4, in violation of Section 10 of Article I of the Federal Constitution (R. 81-82).

Summary of Argument

The first two points in our argument are in support of the proposition that the challenged Local Laws deny to appellant the equal protection of the law and deprive it of property without due process of law in violation of the Fourteenth Amendment, the argument being (1) that, as to all utilities, the classification whereby they are taxed for the particular object of unemployment relief at a rate more than 3000% higher than that at which other businesses are taxed for the same purpose is without any rational basis and constitutes arbitrary and hostile discrimination against a particular class; (2) that the classification is particularly arbitrary and hostile as to the appellant and other street railroad companies operating in New York City because they do not have the advantages over businesses generally which are enjoyed by other types of utilities and are in an even poorer position than ordinary businesses to pay such a heavy tax, being wholly unable to offset such tax through an increase in the rate of fare which they may charge, and (3) that a tax measured by a percentage of gross income and applied to a class which includes street railroad companies along with gas, electric, telephone and other utility companies results in gross inequalities in the distribution of the tax burden among the members of the taxed class itself due to the fact that, by reason of essential differences in the character of the businesses, street railroad companies, including appellant, operate at a far lower ratio of profit so that the tax takes a far larger percentage of their net income than of the net income of other utilities, and since the tax is imposed on the privilege of doing business, and since the

value of such privilege is determined not by gross receipts but by the net profit which can be derived from the exercise thereof, street railroads are taxed far more heavily on the privilege taxed than are other utilities.

Under Point III we contend that the imposition of the taxes in question upon this appellant violates and impairs the obligation of the contract between appellant and the appellee known as Contract No. 4, in contravention of Section 10 of Article I of the Constitution.

ARGUMENT

POINT I

The stated object of the Local Laws was to provide a special fund for unemployment relief, and a classification whereby the appellant is taxed for that purpose at a rate 3000% higher than the rate at which business in general is taxed for the same purpose is violative of the Fourteenth Amendment for the reasons: (A) That the classification does not rest upon any ground of difference having a fair and substantial relation to the object of the legislation, and (B) that, from any point of view, it constitutes arbitrary, unreasonable and hostile discrimination against the appellant and other street railroad companies.

The following rules with regard to classification for purposes of taxation, have been repeatedly stated by this Court as rules which must be complied with in order to avoid conflict with the Fourteenth Amendment: (1) the

classification must rest upon some ground of difference having a fair and substantial relation to the object of the legislation,⁶ and (2) in no event may there be hostile discrimination against particular persons or classes.⁶

A. The challenged classification does not rest upon any ground of difference having a fair and substantial relation to the object of the legislation.

In *Stebbins v. Riley*, 268 U. S. 137, this Court stated the rule as follows (p. 142):

"The taxing statute may therefore make a classification for purposes of fixing the amount or incidence of the tax, provided only that all persons subjected to such legislation within the classification are treated with equality and provided further that the classification itself be rested upon some ground of difference having a fair and substantial relation to the object of the legislation."

In *Colgate v. Harvey*, 296 U. S. 404, this Court again stated the rule as follows:

"* * * the classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co. v. Virginia*, *supra*; *Air-Way Corp. v. Day*, 266 U. S. 71, 85; *Schlesinger v. Wisconsin*, 270 U. S. 230; *Beers v. Glynn*, 211 U. S. 477; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283; *Merchants Bank v. Pennsylvania*, 167 U. S. 461; *Bell's Gap. R. Co. v. Pennsylvania*, 134 U. S. 232.

⁶ *Colgate v. Harvey*, 296 U. S. 404; *Ohio Oil Company v. Conway*, 281 U. S. 146; *Stebbins v. Riley*, 268 U. S. 137; *Royster Guano v. Virginia*, 253 U. S. 412; *Louisville Gas & E. Co. v. Coleman*, 277 U. S. 32; *Air-way Electric Appliance Co. v. Day*, 266 U. S. 71; *Schlesinger v. Wisconsin*, 270 U. S. 230; *Beers v. Glynn*, 211 U. S. 477; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283; *Merchants Bank v. Pennsylvania*, 167 U. S. 461; *Bell's Gap. R. Co. v. Pennsylvania*, 134 U. S. 232.

order to avoid the constitutional prohibition, must be founded upon pertinent and real differences, as distinguished from irrelevant and artificial ones. The test to be applied in such cases as the present one is—does the statute arbitrarily and without genuine reason impose a burden upon one group of taxpayers from which it exempts another group, both of them occupying substantially the same relation toward the subject matter of the legislation? ‘*Mere difference is not enough . . .*’ Louisville Gas. Co. v. Coleman, *supra*; Frost v. Corporation Commission, 278 U. S. 515, 522.”

The challenged laws here in question state in their respective titles that they are Local Laws “*to relieve*” the people of the City from the hardships and suffering caused by unemployment, “*by imposing*” an excise tax on utilities, the amount of the tax being 3% of gross income from all sources. These particular laws impose a tax for unemployment relief on utilities alone and not on any other class of business. Other local laws adopted by the City and having the same stated object—namely, the relief of unemployment—impose an excise tax on financial businesses of 1/5 of 1% of gross income in excess of \$5,000 and an excise tax on businesses in general of 1/10 of 1% of gross receipts in excess of \$15,000 (see p. 9, *supra*).

The City contends that the extreme difference in the rate of tax is immaterial because under the broad power to classify and select the subjects of a tax the City could have placed the entire burden of unemployment relief upon utilities by taxing them alone, and that therefore the mere fact that a nominal tax is also imposed on other businesses gives the utilities no cause for complaint. Certainly, if it is constitutional to tax utilities 3000% more

heavily than other businesses for the purpose of unemployment relief, then, on the same principle which would support such discrimination, there is nothing to prevent their being taxed to the exclusion of all other businesses. For the purpose of the present argument, therefore, we may treat the Local Laws as singling out utilities and taxing them, alone, in order to provide the money necessary for unemployment relief.

We do not believe that ever before has this Court been required to pass upon the validity of a tax statute which stated a specific object sought to be accomplished and which singled out one class of business to bear the burden of it, although that class was in no different position in respect of the object for which the tax was imposed than was business in general. The usual tax statute does not state a specific object sought to be accomplished by the tax. Most tax statutes are general revenue statutes with no specific object stated, other than the object to tax a certain class of persons or property, and in the few instances of cases which have come to this Court in which the tax statute has stated a specific object for which the tax was imposed, there has been a compliance with the rule as stated above, because there was a special relationship between the class taxed and the stated object sought to be accomplished by the statute, as, for example, *Edye v. Robertson*, 112 U. S. 580 (Head Money Cases). Likewise, in the recent cases of *Cincinnati Soap Company v. U. S.*, 301 U. S. 308, and *Carmichael v. Southern Coal and Coke Co.*, 301 U. S. 495, which we shall discuss later, there was a difference between those taxed and those not taxed which bore a relation to the object for which the tax was collected.

Whereas most tax statutes which form a part of the regular tax program of a State do not state any specific object for which the tax is to be collected, when it comes to emergency legislation, aimed at the accomplishment of a specific object requiring a special fund not provided for by the regular tax program, the statute usually does state the specific object sought to be accomplished, and such is the type of legislation we have here. The very difference in the methods of enacting the two types of legislation shows the necessity for adherence to the rule that where the tax statute does state the object sought to be accomplished by the tax, then any classification by which the tax is imposed on one group and not on others must rest upon a difference which bears a relation to the object sought to be accomplished. The regular tax program of the State, at least in the State of New York, is arrived at with the advice and upon the recommendations of the State Tax Commission, which has before it the reports of all corporations in the State through which the Commission has complete knowledge of the earnings and financial conditions of all the various types of business conducted. The regular tax program, therefore, is the result of an effort to arrive at a fair and reasonable distribution of the tax burden. Corporations having special advantages are taxed more heavily than others because of those advantages, but within limits of reason and fairness. On the other hand, in the case of emergency legislation to raise money for the accomplishment of a particular object, the Tax Commission is not usually consulted, nor is there any effort to make a reasonable distribution of the burden of the tax. Any classification made for the purpose of collecting the money necessary for the specified object is

apt to be actuated solely by the thought as to what is the easiest way of collecting the money without making the government unpopular politically. Classification on such a basis leads to singling out a single class, such as utilities, and putting the whole burden upon them, to the exclusion of others, even though the object sought to be accomplished by the tax is one no more related to them than to business in general.

The danger of such arbitrary discrimination in the enactment of legislation to raise a special fund for a particular purpose demonstrates the necessity for the rule that classification, for the purpose of a tax, must be rested upon some ground of real difference bearing a fair and substantial relation to the object of the legislation. Otherwise utilities could be made to pay the entire cost of any public project which might be undertaken. They could be made to bear the entire cost of the social security program of a State, while other businesses, though their employees share in its benefits, contribute nothing toward the program. Our present contention is that a statute which, without good reason, singles out one particular class of business and makes the members of that one class bear the burden of paying for a public project which is no more related to them than to other businesses, violates the Fourteenth Amendment of the Constitution of the United States, and, if so, the challenged Local Laws cannot be upheld.

The sole purpose of the Local Laws here in question was to raise a special fund for unemployment relief in the City of New York. The taxes imposed are not a part of the permanent tax program of the State or City. They are not exactions for the regulation of utilities, nor are

they ordinary excise taxes for the general support of either the state or the city government. They are special emergency exactions levied by the City of New York under a taxing power granted to it by the State legislature for a specified and limited purpose. The titles of the Local Laws specifically state the object to be accomplished thereby and the taxing of utilities is referred to only as the *means* by which that object is to be accomplished. Both the Local Laws themselves and the State laws giving to the City its taxing power provide that the proceeds of the taxes shall not go into the general fund of the City, but must be put into special bank accounts and used for no other purpose than unemployment relief. The object of the Local Laws, therefore, was to provide a fund for a particular project of welfare work and utilities occupy no different position in relation to that project than do businesses generally.

Directly in point is *Lowry v. City of Clarksdale*, 154 Miss. 155, 122 So. 195, 197-198. In that case, the highest court of Mississippi held unconstitutional a tax upon fire insurance companies, the proceeds of which were to be used to establish a firemen's disability and pension fund. The court pointed out that the object of the tax was "the improvement of service in the fire fighting department" and held that the tax therefore was for a public purpose, but it held that the tax, limited to fire insurance companies, violated the equal protection clause of the Federal Constitution, because there was no difference between fire insurance companies and owners of uninsured property, or the public in general, which bore any substantial relation to the particular object sought to be accomplished by the statute. The court pointed out that whereas there were, of course, differences

between insurance companies and owners of uninsured property which would justify separate classification for certain purposes, yet there was no difference which bore any relation to the particular object sought to be accomplished by the statute. The opinion of the court reads in part as follows (pp. 197-198):

“ * * * it is in effect argued that although the duty to all species of combustible property insured and uninsured is the same, yet there is in the status of owners as owners, as distinguished from insurers as such, a sufficiency of distinction that upon this difference in status the classification may be legally upheld. It is true that such a difference might serve for a classification for some purpose, but the argument and every similar argument *overlooks the requirement that the reason upon which the classification is grounded must be a reason which has a just and substantial relation to the particular object to be accomplished*—an object which is a public one, for it is fundamental that no tax may be laid to raise funds for a mere private or personal purpose. The contemplated public object to be accomplished here is the improvement of the service in the fire-fighting department, and since that improvement moves in its benefits and advantages as much and in exactly the same way towards the uninsured owner of property of a certain value as it does toward an insurance company carrying a policy in an equal amount in value on another piece of property, there is no actual difference between the two in relation to the object to be accomplished. And every argument advanced to sustain this tax runs likewise into a corner.”

Statutes similar to that involved in *Lowry v. City of Clarksdale*, *supra*, have been held unconstitutional, as de-

nying the equal protection of the law, both in Nebraska and Louisiana. *Continental Insurance Co. v. Smrha*, 270 N. W. (Nebr.) 122; *Louisville v. Merchants' Insurance Co.*, 12 La. Ann. 802.

Although this Court has not had occasion to pass on the point now presented, the decisions above cited are sustained by principles heretofore stated by it. Thus, in *Nashville C. & St. L. Ry. v. Walters*, 294 U. S. 405, the Court said (pp. 428-430):

“* * * The promotion of public convenience will not justify requiring of a railroad, any more than of others, the expenditure of money, unless it can be shown that a duty to provide the particular convenience rests upon it. * * *”

“* * * when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured.”

See also *Retirement Board v. Alton R. Co.*, 295 U. S. 330.

We urge, therefore, that there is a marked difference between a general revenue statute which states no specific object to be accomplished by the tax and a special levy for a specified purpose, and that this difference bears directly upon the power of the government to classify and tax one type of business more heavily than another. When framing its regular tax program and imposing a tax which is not for the accomplishment of a specific object, the State has a very broad power to classify and select the subjects of the tax, but when it comes to raising a special fund for a particular project, then, as between one business and another, only a difference which bears a relation to that

particular project can furnish a basis for making one business contribute thereto more heavily than another. This, we think, would be the answer if the City sought to tax only utilities for the specific object of raising a fund for building poorhouses, hospitals or schools, or if utilities alone were taxed to raise the money necessary for a social security program, the benefits of which would extend to employees of all businesses. The only ground on which any one group can be singled out and compelled to bear the major part of the expense of a particular project is that such group has a special interest in or duty in respect of such project; otherwise there would be no difference between that group and the rest of the public which would bear any relation to the object for which the money is sought to be raised and there would be no basis for a classification which would tax the one group and not others.

The only answer which the Court of Appeals of the State of New York gave to the foregoing argument was that it had already decided in the case of *New York Steam Corporation v. The City of New York*, 268 N. Y. 137, "that the imposition of a tax on utilities without imposing a similar tax on other industries and businesses is a valid classification and does not constitute a denial of the equal protection of the laws." The opinion, written by Judge FINCH, also cites *Puget Sound Power & Light Co. v. Seattle*, 291 U. S. 619, which is not in point because the tax there considered was not imposed to raise a fund for the accomplishment of a specific object, but was an ordinary excise tax with no specific purpose stated. We do not dispute that for the purpose of an ordinary excise tax not constituting part of a plan for the accomplish-

ment of a specific object, a classification by which utilities are taxed differently from other businesses would be valid and not unconstitutional. In fact this is already done in the regular tax program of the State. The point which the Court of Appeals overlooked, however, in deciding the *New York Steam Corporation* case, and a point which is not answered in the opinion written by Judge FINCH in the case at bar (or in the opinion of the Circuit Court of Appeals for the Second Circuit in *Southern Boulevard R. Co. v. City of New York*, 86 F. (2d) 633, which followed the decision in the *New York Steam Corporation* case), is that there is a distinction between the ordinary excise tax with no specific purpose attached thereto, and a tax which is a part of a plan for the accomplishment of a specified object. The difference between utilities and other corporations which the court referred to in its opinion in the *Steam Corporation* case, namely, that they "are accorded a degree of protection against competition and other advantages over the general business community," are differences which would justify separate classification for certain purposes, but they are not differences which are in any way related to the object of the Local Laws here in question.

Although in neither the *New York Steam Corporation* case nor the case at bar did the Court of Appeals make any reference to the rule that classification for the purpose of a tax must rest upon some difference bearing a relation to the object of the legislation, it did, however, recognize that rule in *Merchants Refrigerating Company v. Taylor*, 275 N. Y. 113, which was decided on the same day as the case at bar. There the court had under consideration, in its application to the business of the Mer-

chants Refrigerating Company, Local Law No. 21 of 1934, as amended by Local Law No. 2 of 1935, which is one of the laws here in question. The word "utility" is defined in that law as including not only every person subject to the supervision of either division of the Department of Public Service, but also every person, whether or not subject to such supervision, who shall engage in the business of furnishing or selling gas, electricity, steam, water, *refrigeration*, telephony and telegraphy. The Merchants Refrigerating Company operated two cold storage warehouses and in addition to furnishing refrigeration in its warehouses and to tenants occupying stores on the ground floor of one of its warehouses, it also furnished refrigeration to some outside premises in the neighborhood by means of pipes under the street laid pursuant to a franchise from the City of New York. The court held that the tax was valid in so far as it was imposed on the very small portion of the appellant's business which consisted of furnishing refrigeration to persons outside of its building by means of pipes laid in the street, but that if the Local Law was considered as authorizing a tax upon the appellant's entire refrigeration business, the statute would be unconstitutional as arbitrary and discriminatory. The opinion written by Chief Judge CRANE cites the case of *Colgate v. Harvey, supra*, and makes the same quotation therefrom which we have made above, in which it is said that the classification "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." Then, after referring to *People ex rel. Farrington v. Mensching*, 187 N. Y. 8, the opinion proceeds as follows:

"Passing for a moment the franchise granted by the City to use its streets, what reason exists for including appellant in the class of those upon whom the tax falls? The City answers that the method, character and nature of appellant's business are sufficiently different from those of general non-refrigerated warehouses to justify difference in treatment for purposes of taxation. Different they, of course, are. Even so, I apprehend that a tax imposed only on warehouse men generally would offend the constitution as much as one imposed only on cold storage warehousemen. A second reason is suggested in that those engaged in rendering the service specified in the local law benefit substantially from money made available for unemployment relief as such services are necessary and essential to modern life; that they benefit materially from the improvement in business. To the same extent would a food merchant, a clothing merchant—in fact, every business man in general. *The reasons advanced by the city in support of the classification do not indicate a difference between appellant and other businesses not taxed which bears any reasonable relation to the attempted classification.* Most of those utilities included within the classification have common characteristics that differentiate them from business in general. The classification was, as to them, held reasonable. Appellant does not share that common characteristic. *No reason appears why appellant should be included within the incidence of the tax while business in general was exempted.*

"As stated above, appellant furnished refrigeration to persons outside its building by means of pipes laid in the streets under a franchise from the City. This constitutes but a small proportion of appellant's business but justifies, nevertheless, the utility tax upon this part of its income."

It is obvious that in arriving at the conclusion that it would be arbitrary and unconstitutional to impose the tax in question on the warehouse business while business in general was exempted, the Court had in mind the specific object sought to be accomplished by the tax. If this had been an ordinary excise tax with no specific purpose stated, there would be nothing to prevent the cold storage warehouse business, or the storage warehouse business generally, from being classified separately and taxed differently from other businesses. This is indicated by numerous decisions of this Court, among which are *Alaska Fish Co. v. Smith*, 255 U. S. 44, where a tax imposed upon herring products was held valid although no similar tax was imposed on other fish or fish products, and *S. W. Oil Co. v. Texas*, 217 U. S. 114, where taxes imposed upon wholesale dealers in oil and like products, and not on other wholesale dealers were upheld. It must have been the fact that the Local Law in question had, as its object, the raising of money for a particular project no more related to the warehouse business than to any other business, which influenced the decision in *Merchants Refrigerating Co. v. Taylor*, *supra*. Indeed, that the Court had in mind the fact that the object of the legislation was to provide for unemployment relief is shown by the reference in the opinion to the fact that every food merchant, clothing merchant, and in fact every business man in general, would benefit as much as the warehouseman from the improvement in business which would result from the money made available for unemployment relief.

It may be urged by the City that if the Local Laws had simply imposed an excise tax without stating a specific object for which the tax was imposed and without limiting

the use of the proceeds to the accomplishment of that object, the classification of utilities would have been valid, and that, after crediting the proceeds of the tax to its general fund, the City could have appropriated the amount thereof for unemployment relief, and thus, by a different method, accomplished the same result; that the difference between the two methods is nothing but a matter of form and that, therefore, it is of no real importance that the Local Laws expressly state the purpose of the tax and limit the use of the proceeds to that particular purpose. The immediate answer to this is that the City did not and *could not* follow the alternative method suggested. It had no power or authority to impose any excise tax except for the accomplishment of the particular object which is stated in the Local Laws and it had no power to credit the proceeds of the tax to its general fund. Its power to impose taxes was specifically limited by the Enabling Acts, namely, Chapter 873 of the Laws of 1934, and Chapter 601 of the Laws of 1935 (R. 28-32), which expressly limited the power granted to the City to the adoption of local laws imposing taxes for the specific purpose of unemployment relief, and provided that the revenues, when collected by the City, should *not* be credited to the general fund of the City, but should be put into separate bank accounts and used for no other purpose than "the relief purposes *for which* said taxes have been imposed." Obviously, it was the intention of the State legislature to limit the City's power to the imposition of such taxes as could constitutionally be imposed when the sole purpose thereof was the raising of a special fund for a particular project.

In the court below the Corporation Counsel pointed to the decision of this Court in *Cincinnati Soap Co. v. U. S.*,

301 U. S. 308, as authority for the proposition that if the tax, limited to utilities, would have been good had the law not stated a specific object to be accomplished thereby, the statement of that object cannot invalidate the tax even if it shows that the classification made by the statute is arbitrary and based on no difference which is related to the object. We do not think that the case is authority for any such broad proposition. The question as to whether or not a valid classification had been made for the purpose of the tax was not involved in that case at all. Indeed, there *was* a special relationship between the subject of the tax and the purpose for which it was collected. The tax, to the extent that it was collected for the benefit of the Philippine Islands, was a tax on the processing of cocoanut oil which came from those Islands. Consequently, the classification provided for in the statute did rest upon a difference which bore a relation to the object of the legislation. All that this Court decided was that the ear-marking of the proceeds of the tax for a proper purpose did not keep it from being a true tax and did not make it an expropriation of money from one class for the benefit of another.

The excise tax which was considered in *U. S. v. Butler*, 297 U. S. 1, would have been perfectly good were it not for the stated object of the legislation. If the statement in a tax statute of the object for which the tax is imposed can invalidate the tax by showing that the purpose of it is beyond the powers of the Federal government, then, we submit, it can also invalidate the tax by showing that an arbitrary classification has been made, not rested upon any difference related to that object. We do not believe, therefore, that the *Cincinnati Soap Co.*

case is authority for the broad proposition that in determining whether a proper classification has been made for the incidence of a tax, the stated object for which the tax is imposed is of no importance and should be disregarded. On the contrary, it is an important factor which must be considered in determining whether the classification made by the statute is arbitrary and unreasonable. Indeed, to say that the object of the legislation should be ignored in determining whether or not a classification is arbitrary is directly contrary to the oft-repeated rule referred to at the outset of this point.

The City will doubtless contend that the opinion recently written by Mr. Justice Stone in *Carmichael v. Southern Coal & Coke Company*, 301 U. S. 495, indicates that the rule to the effect that classification, for the purpose of taxation, must rest upon some real ground of difference bearing a fair and substantial relation to the object of the legislation is now dead, and that, under the decision in that case, a state or a city can, without conflict with the Constitution, adopt a tax statute which states a specific object sought to be accomplished thereby and which at the same time puts the entire burden of the tax upon one particular class of business, even though that class is in no different position in relation to the object sought to be accomplished than business in general. To put such a construction upon the opinion in the *Carmichael* case, it is necessary completely to disassociate the language used from the facts of the case and give it the broadest possible implication.

The tax in that case was radically different from the tax here. Exemption from the tax was the exception rather than the rule. All employers of labor were taxed

at the same rate on their payrolls, with exemption only for those employing less than eight employees and those engaged in a few specific types of business, as to which there was reason for exemption. *Moreover, only employees of the taxed class itself were permitted to share in the fund raised by the tax.* Any employee whose employer was not subject to the tax was not entitled to participate in the fund. Consequently there was a special relationship between the class taxed and the purpose for which the tax was collected. In order to uphold the tax it certainly was not necessary to abolish the rule that classification must rest upon some difference related to the object of the legislation, and we do not believe that this Court intended to abolish that rule, for to do so would be to hold that a state tax statute can never be declared unconstitutional because arbitrary in its classification. *Had the tax in the Carmichael case been imposed only on utilities and had the employees of all businesses shared in the benefits of the fund, we do not believe the tax would have been upheld.* We are confident that this Court will still hold that, though the ear-marking of the proceeds of a tax does not keep it from being a true tax, yet if the statute imposing a tax states a specific object to be accomplished thereby, any classification by which one class of business is singled out and taxed to the exclusion of other classes must rest upon some ground of difference which bears a relation to that object.

B. The classification, from any point of view, constitutes arbitrary, unreasonable and hostile discrimination against the appellant and other street railroad companies operating in the City of New York.

As between the street railroad business and business in general, not only is there no difference which bears any relation to the project of unemployment relief, but there is not even the difference which the Court of Appeals referred to in the *New York Steam Corporation* case, *supra*, as existing between utilities and the general business community. The complaint in this action shows clearly that the appellant is in an entirely different position from other utilities in the taxed class; as, indeed, are other street railroad companies doing business in New York City. Street railroads operating in the City do not enjoy the monopolies and the protection against competition which other utilities enjoy, nor are they able to protect themselves against ruination resulting from excessive taxation by increasing their rates to cover the tax or even any part of the tax. *They are in a far poorer position to bear the burden of unemployment relief than is business in general.*

The complaint shows that, apart from the competition from taxicabs and automobiles which goes far toward reducing the gross revenues of appellant (R. 17), the appellant suffers from very serious competition on the part of the City itself in the operation of rapid transit lines which were built and are operated by the City without any certificate of convenience and necessity and which are not subject to the supervision or control of either division of the Department of Public Service (R. 16). Some of these railroads are built and operated in the

same streets through which the appellant's railroads run and they cause serious loss of revenue to the appellant (Complaint, paragraph Thirty-fourth, R. 16). Not only, however, does the appellant not have protection against competition, but, what is even more serious, it is unable to increase its rate of fare to cover taxes and assure a fair return on its investment (Paragraphs Thirtieth, Thirty-first and Thirty-third, R. 15-16). A gas or electric company can go to the Public Service Commission, and if necessary to the courts to obtain higher rates for the utility service furnished by it, if, in view of the taxes which it is required to pay, present rates fixed by the Commission prove to be confiscatory.⁷ Ordinary business concerns can, without asking permission, increase their prices to cover taxes. The appellant, on the other hand, has no means whatever of obtaining any higher rate of fare, no matter how ruinous may be the taxes imposed upon it. The complaint shows that all the railroads operated by the appellant are operated under a contract with the City by which the rate of fare is limited to five cents per passenger; that the Transit Commission has no power to increase the rate of fare above the amount specified in the said contract and that the appellant cannot increase its rate of fare without the consent of the City which the City has definitely refused to give. (See Complaint, Paragraphs Thirtieth, Thirty-first, Thirty-second and Thirty-third, R. 15-16; see also, *City of New York v. Interborough R. T. Co.*, 257 N. Y. 20, 177 N. E.

⁷ Within the past month the Brooklyn Union Gas Company applied to the Public Service Commission for a rate increase because of an "overwhelming increase in taxation," the company making a special point of the emergency unemployment relief tax here involved. See *New York Herald-Tribune* for December 31, 1937.

295; *Gilchrist v. Interborough Co.*, 279 U. S. 159, 209; *People ex rel. Garrison v. Nixon*, 229 N. Y. 575, 128 N. E. 255).

When we consider, therefore, the fact that the appellant enjoys no monopoly, but, on the other hand, suffers from a serious curtailment of gross revenue due to competition, along with the fact that it cannot pass on any part of the tax to the public, but must absorb it all itself, it becomes apparent that appellant wholly lacks those "advantages over the general business community" upon the basis of which the challenged tax was sustained by the Court of Appeals in the *New York Steam Corporation* case (268 N. Y. 137, 147; 197 N. E. 172, 175), and, further, that it is in a poorer position than ordinary business corporations to bear the cost of unemployment relief. Indeed, with income decreased by the worst kind of subsidized competition,⁸ and with increased wages for labor, increased cost of materials, the new social security taxes and this tax of 3% of gross income for unemployment relief, all to be paid out of a fare which is limited to five cents per passenger, every street railroad company in the City of New York is in a most perilous position, the Interborough Rapid Transit Company and the Manhattan Elevated Railway Company being already in receivership and other street railroad companies being on the verge of it.

⁸ The report of the Transit Commission for the fiscal year ending June 30, 1937, recently published, shows that the Interborough Rapid Transit Company and this appellant, together, carried 39,100,000 fewer passengers than during the previous fiscal year, while the rapid transit lines operated by the City carried 53,000,000 more passengers than during the previous year. The report further shows that, while total operating revenues of all rapid transit and street surface railways in New York City, including those operated by the City, were \$3,076,000 less during said fiscal year than during the previous year, the lines operated by the City showed an increase in revenues of \$2,735,000. (See Summary of Reports of Rapid Transit, Street Surface Railway and Bus Companies operating in the City of New York for the Quarter April-June, 1937, and for the Fiscal Year Ended June 30, 1937.)

We contend, therefore, that even if the Court were to ignore the rule that classification must be rested on some ground of difference having a fair and substantial relation to the object of the legislation and were to test the reasonableness of the classification simply by asking the question, "Can those included in the taxed class better bear the burden of providing the fund necessary for unemployment relief than those who are not within the class?", the answer would be emphatically that as to street railroad companies they certainly cannot.

We think it must be conceded that even if it is not necessary that one group have a special interest in, or duty in respect of, the particular purpose for which a tax is collected, in order to justify taxing that group more heavily than others, nevertheless the purpose of the tax is at least a factor to be considered in determining whether or not the classification is arbitrary, and that if, having in mind that purpose, there is no reasonable or rational basis *whatever* for the selection of one class to bear the entire burden or a greatly disproportionate share of the burden, a classification whereby that is brought about would be violative of the Fourteenth Amendment. Unless the purpose of the tax and the entire program adopted for the accomplishment of that purpose are taken into consideration, it is impossible intelligently to determine whether there has been any unreasonable discrimination or not.

In order to apprise the Court of the entire program adopted by the City to provide a fund for unemployment relief, the complaint not only sets forth the Local Laws which are challenged in this action, but also describes all other taxes imposed by other Local Laws, under the same enabling legislation, to raise money for unemployment relief (R. 13-14). The sales tax and personal property tax

(see p. 9, *supra*) are imposed on all purchasers of tangible property and utilities are among the biggest individual payers of these taxes because they must pay the tax on all supplies and materials which they purchase in their business, whereas manufacturers, who buy materials for manufacture of the goods they sell, pay no tax on the materials they buy, articles purchased for resale being exempt from tax (see Local Law No. 24 of 1934). The only other taxes imposed for the purpose of unemployment relief, except an inheritance tax which was quickly repealed, are taxes on the privilege of doing business, and while utilities are taxed for this privilege at 3% of their gross income from all sources, without the allowance of any exemption or deduction, financial businesses are taxed at only $\frac{1}{5}$ of 1% on their gross income in excess of \$5,000, and all other persons and corporations carrying on any trade, business, profession or commercial activity, are taxed at only $\frac{1}{10}$ of 1% of gross receipts in excess of \$15,000. The difference in the rate is the same as though ordinary businesses were taxed at less than 3% of their gross income and utilities and transit companies at a full 90%. *Expressed in percentages, the rate for utilities is more than 3000% higher than that applied to ordinary businesses.*

It is our contention that even if the advantages which other types of utilities (not street railroad companies) enjoy, would justify some difference between the rate of tax applied to them and that applied to business in general, it does not justify taxing them alone and does not justify such an extreme difference in the rate of tax as is provided for in the program adopted by the City. But it is our further and more important contention that, since this appellant, and other street railroad companies in New

York City do *not* enjoy the advantages which other types of utilities enjoy, and are in an even poorer position to bear the burden of the tax than businesses in general, there is no justification, from any point of view, for any heavier tax upon them than is imposed upon businesses in general, and that to make the appellant contribute towards unemployment relief *thirty* times as large a percentage of its *gross* income as an ordinary business corporation is required to contribute, is not only unfair and unreasonable, but constitutes plainly hostile discrimination.

Mr. Justice BRANDEIS, in his dissenting opinion in *Royster Guano Co. v. Virginia*, 253 U. S. 412, said that what the Fourteenth Amendment particularly forbids is "action attributable to hostile discrimination against particular persons or classes" (pp. 417-418). Considering the purpose for which the present tax was imposed, the difference in the rate applied to the appellant and similar street railroad corporations as compared with that applied to other businesses is so unreasonably extreme that it can only be explained on the ground of a hostile attitude toward utilities, or what is the same for present purposes, as a deliberate attempt to saddle the great bulk of the City's relief burden on a select group of corporations which, unlike other businesses, could not escape it.

As previously pointed out, the difficulty with emergency tax legislation to raise a special fund for the accomplishment of a particular object, is that such legislation is apt to be enacted without any thought as to a fair distribution of the tax burden and only with the thought as to what is the easiest way to obtain the money for the particular purpose without making the government too unpopular politically. Here, there was obviously no effort to provide

for any fair or reasonable distribution of the tax burden. One class of persons and corporations was singled out and made to contribute on an entirely irrational and unreasonable basis for the accomplishment of an object no more related to the members of that class than to any other class of business. It is all too plain that the principal thought behind the classification was that utilities could not escape the tax by moving out of town as other businesses might do if taxed too heavily and, with this thought behind the classification, street railroad companies were put into the class along with other utilities. A tax system must be arranged so that it can be seen that there is at least some attempt to make a fair and reasonable distribution of the tax burden. The fact that a particular group happens to be at the mercy of the City government, having in good faith invested a large amount of capital for public service by building structures in the City streets which cannot be removed, is not a just or reasonable basis for singling out such investors and making them bear the load, even to the point of destruction, of a project no more related to them than to others, while all others escape from the burden entirely or have to pay no more than a mere nominal amount. Those who invest their money in a street railroad enterprise are entitled to just as fair treatment as those who invest in other enterprises and there is no reason why they should be taxed to an exorbitant extent in order to raise a fund for the support of laid-off employees (for the most part) of other businesses, while those businesses contribute next to nothing toward the project.

Upon no rational theory can it be said to be fair or reasonable to impose upon a street railroad company for

the special purpose of unemployment relief in the City of New York, a tax of \$1,050,000 based on a gross income of \$35,000,000 while a large business corporation having the same gross income from business done within the City is taxed less than \$35,000 for the same purpose. This differentiation is so palpably unreasonable and unjust that it amounts to nothing short of plainly hostile discrimination.

It was urged by the City in the court below that the fact that appellant is prevented by its own contract from obtaining any increase in the rate of fare is a mere accident of trade which, though it may cause the tax to be particularly burdensome upon the appellant, is nothing which the Court can consider in determining the validity of the tax. It must be borne in mind, however, that the contracts of the appellant and other street railway companies, whereby they are prevented from ever charging more than a five cent fare, are not contracts with outside parties, of which the City had no reason to know at the time the Local Laws were adopted, but are contracts between the railroad companies and the City itself. The City had knowledge of these contracts at the time it adopted the Local Laws. If it carelessly ignored the situation and by a peculiar definition of the taxed class threw street railroads into the same class with gas, electric, telephone and other utility companies without regard to the peculiar position in which street railroad companies were placed by reason of contracts with the City itself, this is all the more evidence of arbitrary action on the part of the City in making the classification which was made.

It will be noticed that in the Local Laws no specific mention is made of the railroad or transportation business and that street railroads are brought into the taxed

class only by reason of the definition by which the class was made to include all persons "subject to the supervision of either division of the Department of Public Service." Other utility businesses are specifically mentioned, but not the business of furnishing railroad service or any other kind of transportation. Classification for the purpose of any kind of an excise tax should be made by specific reference to the character of the business which it is intended to tax and a method of classification by which the sole test of taxability is whether or not a person is subject to the supervision of a Commission is an arbitrary method. It is only because this method of classification was used, that a street railroad company is brought into the taxable class, and not because of any specific mention of the street railroad or transportation business.

Arbitrary classification, without any thought or consideration being given to the fact that the broad language used in the statute brings into the same class with more favorably situated utilities, street railroad companies, which the City, by reason of its own contracts with them, should know are in even a poorer position to contribute toward unemployment relief than ordinary business corporations, and causes them to be taxed on their gross incomes at a rate 3000% higher than that at which such ordinary business corporations are taxed, is a classification which not only fails to rest upon any difference bearing a fair and substantial relation to the object of the legislation, but also fails to find support in any rule of reason.

The classification is palpably arbitrary and hostile as to all utilities, but particularly so as to the appellant and

other street railroad companies. Considering the fact that the City, with full knowledge of the inadequacy of a five cent fare, and with knowledge that, because of its own contracts with them, the street railroad companies cannot increase their rate of fare without its consent, has definitely refused to give that consent, and considering the further fact that, with disregard of the resultant destruction of private capital, the City has built subways under the same streets in which street surface and elevated railroads are owned and operated by the appellant and other railroad companies, the imposition upon those same companies of this tax of 3% of gross income, while ordinary business is taxed for the same purpose at the rate of only 1/10 of 1% of gross income, makes it appear as if the City had deliberately embarked upon a policy of oppression of street railroad companies. We submit that there could hardly be a clearer case of hostile discrimination against a particular group of corporations than the discrimination against the appellant and other street railroad companies which is found in these Local Laws.

POINT II

By reason of inherent differences in the character of the respective businesses, a tax of 3% of gross income applied to a class of corporations which includes street railroad companies along with gas, electric, telephone and other utility companies, results in gross inequalities in the distribution of the tax burden among the members of the taxed class itself and denies to appellant and other street railroad corporations the equal protection of the law, in violation of the Fourteenth Amendment of the Federal Constitution.

It was upon this point that Mr. Justice STEUER at Special Term of the Supreme Court of New York, sustained the sufficiency of the complaint herein (R. 56-57), and his decision was affirmed without opinion by the Appellate Division (R. 59-60).

It is a fundamental principle of taxation that where a classification is made for the purpose of a tax, all persons within the classification must be treated with equality.⁹ It is equally clear that the requirement of equal treatment within the class is not necessarily met merely by the application of the same rate of tax on all within the class. *Pacific Express Company v. Seibert*, 142 U. S. 339, 351. Otherwise form, and not substance, would determine the validity of the exercise of the taxing power. The constitutional requirement is that the statute have "the attribute of equality of operation" which does "not mean indiscriminate operation on per-

⁹*Stebbins v. Riley*, 268 U. S. 137; *Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550; *F. S. Royster Guano Co. v. Virginia*, 253 U. S. 412; *Hopkins v. So. Cal. Tel. Co.*, 275 U. S. 393; *Raymond v. Chicago Traction Co.*, 207 U. S. 20, 37, and *Magoun v. Illinois Trust and Savings Bank*, 170 U. S. 283.

sons merely as such, but on persons according to their relations." *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 293.

The class upon which the Local Laws in question purport to impose a tax of 3% of gross income from all sources is defined in the said laws as including all who are "subject to the supervision of either division of the Department of Public Service." This is a class which includes street railroad companies along with gas, electric, telephone, steam and water companies, the businesses of which are essentially different in character and yield widely differing ratios of profit. We contend that an excise tax measured by a percentage of gross income from all sources and applied to such a class, results in such gross inequalities within the taxed class itself, by taking a far larger proportion of the net income of one member of the class than of that of another, and taxing one far more heavily than another on the value of the privilege taxed, as to be violative of the equal protection clause.

On the record, the admitted facts are:

(a) The operating and maintenance expenses of street railroad and rapid transit corporations (including appellant) in the City of New York, are far higher in proportion to gross receipts than in the case of other types of businesses within the taxed class (R. 18).

(b) The ratio of net income to gross receipts is far higher in the case of corporations engaged in selling gas, electricity, refrigeration, steam, water, telephone or telegraph service in New York City and subject to the challenged tax, than in the case of appellant or any other railroad corporation in-

cluded within the class taxed by said Local Laws (R. 18-19).

(c) These distinctions are not merely temporary "accidents of trade" resulting from varying degrees of efficiency in management or otherwise, but are constant disparities which result from the fact that the respective businesses of the corporations included within the class *are essentially different in character* (R. 25).

Illustrating the foregoing, the complaint alleges that for 1935 the net income of Brooklyn Edison Company, a corporation selling electricity in New York City and subject to the supervision of the Department of Public Service, was, before deduction of taxes, approximately 42% of its gross receipts, whereas for the same period appellant's net income, before deduction of taxes, was approximately 19% of its gross receipts (R. 18) and the net income of Brooklyn & Queens Transit Corporation (the appellant in case No. 436) was, before deduction of taxes, only 14½% of its gross receipts (R. 19).

It is further alleged that other street railroad corporations operating in the City of New York, while having substantial gross receipts from the conduct of their business during the year 1935, suffered a net loss for the year and had no net income out of which to pay the taxes imposed by the Local Laws in question, so that the payment of such taxes simply added to their deficits (R. 19).

A search of the authorities has failed to reveal any case in which a gross income tax, even when applied to one line of business, has ever been sustained in the face of proof of constant wide differences in the ratios of net

income to gross throughout the taxed class and in the face of a contention that the tax, measured by a percentage of gross income, resulted in gross inequalities in the distribution of the tax burden within the class itself. In the absence of proof to the contrary, it may possibly be inferred that the ratio of profits to gross income will be very much the same with all companies engaged in the same line of business, but where the taxed class includes corporations, the businesses of which are essentially different in character, there is no room for any inference that the margin of profit of all members of the class will be the same. Whatever may be said about the validity of a gross income tax when applied to a single line of business, it certainly results in gross inequalities in the distribution of the tax burden when applied to a class made up of corporations which conduct essentially different types of business and which, on that very account, have widely differing ratios of profit, not in one period alone but constantly. Here, we have street railroad companies and gas, electric, steam, telephone and water companies all put into the one taxable class and subjected to a tax of 3% of their gross income, regardless of the fact that one business is not comparable with another and that the ratio of net income to gross in the case of one is vastly different from that in the case of another, not merely temporarily but constantly, and not due to any accident of trade or varying degrees of efficiency in management but to essential differences in the character of the business.

It is a matter of common knowledge that the principal item of expense in the operation of street railroads is the cost of labor, and for obvious reasons such labor cost

is bound to be higher in the case of street railroads than in the case of utilities generally. An electric company, for example, sends electricity through its cables and conduits and the customers help themselves to the current, while a railroad company has to employ men to operate every train or car which carries passengers. The conduits and cables of an electric company are underground and require comparatively little attention, whereas the roadbed, equipment and rolling stock of a railroad company are subjected to constant heavy wear and tear and require constant inspection, repair and renewal. A street surface railroad company in New York City has to keep in repair the street pavement within the area of its tracks and for two feet on either side. A railroad company also has to pay out much more on account of damage claims than does an electric company.

The disparity in the spread between gross and net, as between a railroad company and an electric company in New York City, is aggravated by the fact that street railroads in the City meet with publicly subsidized competition from rapid transit railroads constructed and operated by the City itself (R. 16), with the result that gross receipts of privately operated street railroads have been drastically reduced without a corresponding decrease in operating costs.

It is easily seen, therefore, that the margin of profit in the street railroad business in New York City is bound to be far lower than in the gas, electric, or telephone business, even if the management of the former be more efficient than that of the latter. The inequality of tax burden of which appellant complains is not the result of variations in the degree of efficiency of man-

agement or mere accidents of trade or of temporary conditions, but of a constant situation which inevitably results from inherent differences in the various businesses (R. 25).

In the recent case of *Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550, this Court held that a graduated tax on gross receipts imposed as a license tax on all retail merchants was unconstitutional because of the gross inequalities which the evidence showed resulted therefrom, it being pointed out that companies with large gross incomes had less net income than companies with smaller gross, and that the ratio of net income to gross varied with the character of the business as well as its volume. The following are quotations from the opinion written by Mr. Justice ROBERTS which we think are pertinent:

(Pages 555-556)

"The tax is not confined to a particular method of merchandising. All retailers, individual and corporate, selling every description of commodities, in whatever form their enterprises are conducted, make up the taxable class."

(Pages 558-559)

"Argument is not needed, and indeed practical admission was made at the bar, that the gross sales of a merchant do not bear a constant relation to his net profits; that net profits vary from year to year in the same enterprise; *that diverse kinds of merchandise yield differing ratios of profit; and that gross and net profits vary with the character of the business as well as its volume.* The trial court made no finding that the relation between gross sales and net profits, or increase of net

worth, was constant, or even that there was a rough uniformity of progression within wide limits of tolerance."

(Pages 559-560)

"We are told that the gross sales tax in question is in truth a rough and ready method of taxing gains under the guise of taxing sales; that it is less complicated and more convenient of administration than an income tax; and Kentucky for these reasons is at liberty to choose this form, and to ignore the consequent inequalities of burden in the interest of ease of administration. The argument is in essence that it is difficult to be just, and easy to be arbitrary. If the Commonwealth desires to tax incomes it must take the trouble equitably to distribute the burden of the impost. Gross inequalities may not be ignored for the sake of ease of collection."

The doctrine of the *Stewart Dry Goods Company* case was reaffirmed in *Valentine v. The Great Atlantic & Pacific Tea Company*, 299 U. S. 32.

We submit that if an excise tax based on graded percentages of gross receipts is unconstitutional because of the inequalities in the distribution of the tax burden resulting from the application of such a tax to a class of diverse kinds of business yielding differing ratios of profit, then an excise tax which is measured by a flat 3% of gross income is likewise unconstitutional and void when it is applied to a class including a variety of different types of business yielding widely differing ratios of profit. If, as clearly appears from the allegations in the complaint, the ratio of net income to gross income is far lower in the case of all street railroads, including

the appellant, than in the case of other utilities, then a tax measured by 3% of gross income from all sources and applied to all types of utilities has the same discriminatory effect and results in just as gross inequality in the distribution of the tax burden as the graduated tax on gross income which was held unconstitutional in the *Stewart Dry Goods Company* case. The mere fact that a gross income tax may be easy for the City to collect does not justify it. To quote Mr. Justice ROBERTS again, "Gross inequalities may not be ignored for the sake of ease of collection" (294 U. S. at page 460).

The basic holding in the *Stewart Dry Goods Co.* case is that classification for the purpose of an excise tax on the privilege of doing business must rest upon differences having a fair relation to the value of the privilege taxed. As it was unreasonable to classify vendors of merchandise, for the imposition of a graduated tax, solely by reference to volume of sales, in the absence of any constant relationship between volume of sales and net profits (by which only the value of the privilege of selling may be gauged), so, we submit, it is unreasonable to classify street railroads with other utilities for the imposition of a gross income tax at a uniform rate when, because of inherent differences referred to, certain members of the class are forced to pay a much higher proportionate amount than others on the value of the privilege. The Local Laws here in question impose a tax on the privilege of doing business and the value of that privilege is determined not by gross receipts, but by the net profit which can be derived from the exercise of the privilege under efficient management. *If a tax of 3% of gross income requires a street railroad company to pay several*

times as high a percentage of its net income as a power company is required to pay, then it is being taxed at several times as high a rate as is the power company on the value of the privilege taxed. Where the businesses in a taxed class are inherently different and constantly yield widely differing ratios of profit, there can never be any fair relationship between the taxpayer's capacity to pay and his gross income which will be even roughly equal as between the members of the taxed class, since the incidence of the tax on two taxpayers having identical gross income may well be to leave one with substantial net profits and the other with an operating loss, and will always result in the one taxpayer paying a higher rate of tax on the value of the privilege taxed. *A uniform rate of tax applied to unequals results in just as great inequality as unequal rates of tax applied to equals.*

In *Pacific Express Co. v. Seibert*, 142 U. S. 339, 351, this Court said:

"A system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principle of uniformity and equality in taxation and of a just adaptation of property to its burden."

In *Cumberland Coal Co. v. Board*, 284 U. S. 23, this Court said, page 29:

"* * * the fact that a uniform percentage of assigned values is used, cannot be regarded as important if, in assigning the values to which the percentage is applied, a system is deliberately adopted which ignores differences in actual values so that property in the same class as that of the

complaining taxpayer is valued at the same figure (according to the unit of valuation, as, for example, an acre) as the property of other owners which has an actual value admittedly higher. *Applying the same ratio to the same assigned values, when the actual values differ, creates the same disparity in effect as applying a different ratio to actual values when the latter are the same."*

In the case last cited, this Court held invalid assessed valuations of coal lands arrived at by the application of a uniform ratio to assigned values, which resulted in substantial inequalities of tax burden due to the fact that the tax authority ignored differences in the actual values of properties subject to the tax. Just as in that case, the coal lands, though having similar physical characteristics, represented different values because of varying proximity to markets and transportation, so also the privileges of engaging in different types of businesses, though they may yield the same amount of gross receipts, will differ in real value, depending upon the net profits which are represented by the gross receipts. And just as a uniform rate operated unequally when applied to the coal lands under a system which ignored true values, so also a uniform rate operates unequally when applied to gross receipts under a classification which ignores the fact that a dollar of gross receipts represents 42 cents of net profit to an electric company and only 19 cents (or less) of net profit to a street railroad company.

A uniform tax of 3% upon the gross income of all members of a class may have the surface appearance of treating all members of the class alike, but this Court has frequently indicated that in judging the validity of a tax it will not be governed by surface appearances, but

will look to see how the tax operates. For example, in *U. S. Glue Co. v. Oak Creek*, 247 U. S. 321, the tax had the appearance of being a tax on the franchise to do business and not a direct tax on gross income, but the Court held that because, in its operation, the tax was based on each and every item of gross income, irrespective of profit, the tax must be held to be a direct tax on gross income, and that, therefore, receipts from interstate commerce could not be included in the income taxed, although, had the tax been measured by a percentage of net income, it would have been treated as a tax on the franchise and receipts from interstate commerce could have been included in determining the net income by which the tax was measured. As a matter of fact, the opinion in the case just cited, and the opinions in *Crew Levick Co. v. Penn.*, 245 U. S. 292; *Shaffer v. Carter*, 252 U. S. 37, 57; *Peck & Co. v. Lowe*, 247 U. S. 165, point out clearly how unreasonable, in any case, is a tax based on gross income and they definitely show that in determining the validity of such a tax the Court will inquire into the effect of the tax in its actual operation.

We urge, therefore, that whatever may be thought of the validity of a gross income tax limited to corporations engaged in the same business, where there may be room for the assumption that the ratio of profit to gross income will be relatively constant, certainly where the taxed class includes corporations whose businesses are inherently different, necessarily resulting in highly disparate ratios of profit to gross income, the application of a gross income tax cannot be sustained in reason or on authority.

Three points in opposition to the foregoing argument have been made by the City and adopted by the New York State Court of Appeals. They are as follows:

(1) That taxes upon chain stores have been upheld, although it was evident that the burden of the tax fell more heavily on some in the classification than on others.

(2) That the tax considered in the *Stewart Dry Goods Company* case was a graduated or sliding scale tax on gross receipts as compared with the fixed rate tax in the case at bar.

(3) That if transit companies had been grouped by themselves and been taxed 3% on their gross income, while a separate 3% tax was imposed on other utilities, the transit companies could make no valid objection and that no attention should be paid to a mere matter of form if the same result could be accomplished by making separate classifications.

As to point (1), we believe this Court has well distinguished between a tax on incomes and other types of taxes. The chain store taxes which were upheld by this Court were license fees of a flat amount per store, *irrespective of income*, the flat fee being greater or less, depending upon the number of stores in the chain. *They did not purport to be taxes on income*. No one would think for a moment of contending that a license fee of a fixed amount per store would be bad just because one person in his store made several times more profit in his business than some other person operating a similar store. The reason for this is that a license fee of a fixed amount has no relation to income at all. A tax of that charac-

ter, made larger, but still always a fixed amount, for each additional store in the chain may be valid so long as there is reasonable basis for the sliding scale; and the fact that there are conceded advantages in chain store operation furnishes that basis. The question of comparative net incomes is immaterial for the tax is not a tax on income. A good illustration of the difference between a tax based on a fixed-fee-per-store and a tax measured by a percentage of gross income is found in *Valentine v. The Great Atlantic and Pacific Tea Company*, 12 F. Supp. 760, affirmed 299 U.S. 32, 57 Sup. Ct. 56, where the statute provided for both types of taxes, and where the tax based on gross income was held to be bad because of the inequalities resulting therefrom, though the graded fixed-fee-per-store tax was held to be good. A tax of a flat fee per store, whether fixed or graduated, is not an income tax at all. It is not related in any way to income. The attitude of this Court towards inequalities resulting from a tax on gross income and applied to a broad class of businesses, essentially different in character, is shown by the following sentence in the opinion in the *Stewart Dry Goods Company* case:

"If the Commonwealth desires to tax incomes it must take the trouble equitably to distribute the burden of the impost."

As to point (2), for reasons already set forth (pp. 51-55, *supra*), the fact that the tax in the *Stewart Dry Goods Company* case was a graduated tax while the tax here is a fixed-rate tax is a distinction of little importance. If gross inequalities in the distribution of the tax burden result from a gross income tax applied

to a class made up of essentially different businesses having widely differing ratios of profit, it should make no difference in principle whether the rate of the tax is fixed or graduated. The very fact that this Court has held unconstitutional a graduated gross income tax applied to a broad class of different kinds of merchandisers while it has upheld a graduated fixed-fee-per-store tax on the same broad class shows that it could not have been simply the sliding-scale feature of the tax which made the former bad, but rather the fact that it was an income tax. A tax on incomes which takes a far larger percentage of the net income of one member of the taxed class than of another, due to the fact that the character of the business of the former is essentially different from that of the latter and for that reason yields a far lower ratio of profit, results, without good reason, in a grossly unjust discrimination against the business yielding the lower ratio of profit, and this is so whether the percentage of gross income by which the tax is measured is fixed or graduated. The inequalities which make the tax bad are present in either case.

As to point (3), it is difficult for us to see how the Court can disregard the classification made by the statute and sustain it on the theory that if different classifications had been made the same result could have been accomplished. Had the Municipal Assembly given enough thought to the classification to separate transit companies and put them in a different class from other utilities, it would have been because of the differences in the businesses of the corporations, and the same deliberation which led to the separate classification would undoubtedly have led to the fixing of a lower rate of tax upon street railroad companies than upon other utilities. Classifi-

cation for purposes of taxation may be arbitrary by reason of careless lack of thought in arranging the classification, just as well as by reason of any deliberate hostility. Had the Municipal Assembly given any thought to the matter, they would have seen the necessity for making a separate classification, and had they seen that necessity they would also have seen the necessity for a difference in the rate of tax. Since the Municipal Assembly, carelessly and without thought, put into one taxable class all persons "subject to the supervision of either division of the Department of Public Service," we do not see how a court can disregard the classification made, for there is no way of knowing what rates of tax would have been fixed had thoughtful deliberation been given to the classification. It might have been argued in the *Stewart Dry Goods Company* case that had every different type of merchandising been put into a separate class by itself there would not have been any gross inequalities within any one class, but this Court did not disregard the classification made by the statute in that case. On the contrary, it called particular attention to the classification made by the statute as it stood, pointing out (pp. 555-556):

"The tax is not confined to a particular method of merchandising. All retailers, individual and corporate, selling every description of commodities, in whatever form their enterprises are conducted, make up the taxable class."

Furthermore, we submit that even if the City had made two separate classifications and had taxed both classes on the basis of the same percentage of gross income, it still would have been unconstitutional upon a

showing that the tax took several times as large a percentage of the net income of transit companies as of the net income of other utilities, for there certainly was no reasonable ground for taxing street railroad companies more heavily than other utility companies on the value of the privilege taxed, whether in the same law or in separate laws.

The conclusion must be reached, therefore, that since the challenged Local Laws are so framed that *in their operation* they have the effect of taxing some members of the class at a far higher rate than others on the value of the privilege taxed, making them pay a far higher percentage of their net income than others are required to pay, they are not consistent with the constitutional requirement of equal protection of the law and are repugnant to the Fourteenth Amendment of the Constitution of the United States.

POINT III

The imposition by the City on appellant of a tax on or measured by its gross income violates and impairs the obligation of Contract No. 4, in violation of Section 10 of Article I of the Constitution.

The court below rejected this contention, stating, on authority of *Puget Sound Co. v. Seattle*, 291 U. S. 619, and two other like cases, that "a grant of a franchise does not carry with it an implied surrender of the power to tax," and, further, that the right to tax cannot be lost by "tenuous implication" (R. 66-67).

In thus approaching appellant's contention from the viewpoint of cases dealing with the situation—wholly unlike that here—where tax exemption is sought to be *implied* from the grant of a franchise, the court below, we respectfully submit, was led into error. Appellant's contention in the case at bar does not, primarily at least, rest upon an implied contract not to levy the challenged tax, but on the ground that the tax constitutes a direct violation of the City's affirmative covenants contained in Contract No. 4 for which there is no authority in the contract itself or elsewhere.

A. This Court will determine independently the proper interpretation of Contract No. 4 and whether its obligations have been impaired.

It is clear that the Local Laws, having been enacted pursuant to legislative authority, are laws within the meaning of Section 10 of Article I of the Constitution;¹⁰ that, in enforcing the constitutional restriction against the impairment of contracts, this Court will determine for itself, independently of the conclusions of the State court, the existence of the contract, its proper interpretation, and whether its obligation has been impaired;¹¹ and that in construing the contract this Court will look not only to the language employed but to the subject matter, the re-

¹⁰ *St. Paul Gas Light Co. v. St. Paul*, 181 U. S. 142; *Mercantile Trust Co. v. Columbus*, 203 U. S. 311, 320; *Northern Pacific Railway v. Duluth*, 208 U. S. 583, 590; *Cuyahoga Power Co. v. Akron*, 240 U. S. 462, 463-464.

¹¹ *Appleby v. City of New York*, 271 U. S. 364, 379-380; *Electric Lines v. Empire City Subway*, 235 U. S. 179, 186; *Detroit United Ry. v. Michigan*, 242 U. S. 238, 249; *Milwaukee Elec. Ry. Co. v. Milwaukee*, 252 U. S. 100, 103; *Hale v. Iowa State Board*, No. 16, present term, decided Nov. 8, 1937.

lation of the parties, their connection with the subject matter, and the circumstances surrounding the making of the contract.¹²

B. History and outline of Contract No. 4¹³

Long prior to Contract No. 4 it was recognized that rapid transit in the City of New York was a matter of State, as well as local, concern. Thus, in *Matter of McAneny v. Bd. of Estimate, etc.*, 232 N. Y. 377, 134 N. E. 187, it was said (p. 393):

“Rapid transit for the City of New York has, for many years, been a matter of public interest, affecting not only the people of that City, but of the whole State. It has been generally regarded as a State affair. * * * All of the legislation bearing on the subject has for many years recognized that a duty rested upon the legislature to provide for rapid transit, * * * a function which the State, in its sovereign capacity, had a right to exercise irrespective of the City authorities, * * *”.

In the discharge of such duty the State legislature enacted the Rapid Transit Act (Ch. 4, Laws of 1891) which, as amended from time to time prior to 1912, provided generally for rapid transit construction and operation in New York City.

In 1912 rapid transit facilities in New York City were unsatisfactory. The City, to remedy the situation, ad-

¹² *Nash v. Towne*, 5 Wall. 689, 699; *Rock Island Railway v. Rio Grande Railroad*, 143 U. S. 596, 609.

¹³ The facts stated as to the history of Contract No. 4, so far as they do not appear in the complaint, are taken from *Admiral Realty Co. v. City of New York*, 206 N. Y. 110, 99 N. E. 241. See also, *Gilchrist v. Interborough Co.*, 279 U. S. 159.

vertised for bids for the construction of new subways with private capital, and received no bids. In this situation the Public Service Commission and officials of the City of New York entered into negotiations on behalf of the City with the Interborough Rapid Transit Company and with New York Municipal Railway Corporation, predecessor in title of appellant, which eventually resulted in the making of two contracts, similar in many respects; one between the City and Interborough Rapid Transit Company, known as Contract No. 3, and the other, Contract No. 4, between the City and appellant's said predecessor.

While these negotiations were in progress, the Rapid Transit Act was amended (Ch. 222, Laws of 1912) to authorize the City to enter into contracts of such character. The amendment tacitly recognized the inability of the City to finance needed rapid transit railroads and contemplated, in the express authorizations granted, unified operation of City-owned and privately-owned rapid transit railroads by a lessee which would contribute to cost of construction of the City's railroads, equip them as well as its own, and operate both as a unified system for a single fare.

Pursuant to such authority Contract No. 4 was executed, on March 19, 1913.¹⁴ It followed closely the terms of the Rapid Transit Act and recited (Art. III, p. 11) that said Act "is to be deemed a part hereof as if incorporated herein".

The contract provided for the construction of City-owned rapid transit lines (called the "Railroad," the Com-

¹⁴ Contract No. 3, above mentioned, was entered into on the same day. For the provisions and history of that contract, see *Gilchrist v. Interborough Co.*, 279 U. S. 159.

pany-owned lines being referred to as "Existing Railroads"; Art. II, p. 3) and for a contribution by the Lessee (i. e., appellant's predecessor) of \$13,500,000 toward the cost of such construction plus the cost of construction of the physical connection between two subdivisions of the "Railroad" at Canal Street and Broadway (Art. XI, pp. 21-24). It also provided that the Lessee should at its own expense equip the "Railroad," title to such equipment to vest immediately in the City (Arts. XXXVII, XLIV, pp. 44-47), and that it should pay the cost of extensions and additional tracks authorized by the Commission and the cost of reconstruction of the "Existing Railroads" to adapt them for operation in connection with the "Railroad" (Art. XIII, pp. 24-25; R. 4).

By the contract the "Railroad" and equipment were leased to the Lessee for a term of 49 years (to begin on completion by appellant of subdivisions I and II of the Broadway-Fourth Avenue line), to be operated by the Lessee in conjunction with its "Existing Railroads", as a single combined system, *for a single five-cent fare* (Arts. LVIII, LIX and LXII, pp. 70-71; R. 4).

The contract provided (Art. XLIX, p. 60; R. 4-5) for the pooling of *all receipts whatever* from the operation of the "Railroad" and "Existing Railroads," and for payment to the City of 50%, and retention by the Lessee of the remaining 50%, of "the income, earnings and profits" thereof, to be arrived at by deductions from gross receipts of rentals, taxes, expenses of operation, maintenance and depreciation charges, *and certain preferential payments, first to the Lessee and then to the City*. In this connection, Art. XLIX (p. 60) provided:

"In consideration of the operation of the Railroad and the Existing Railroads in conjunction with

each other for a single fare and of the contribution by the Lessee to or toward the cost of construction of the Railroad as aforesaid, * * * the *gross receipts from whatever source derived directly or indirectly* by the Lessee or on its behalf in any manner from, out of or in connection with the operation of the Railroad and the Existing Railroads (hereinafter referred to as the 'revenue') shall be combined during the term of this contract and the City shall receive for the use of the Railroad at the intervals provided a specified part or proportion of the income, earnings and profits. * * *."

Article XLIX (p. 60) then provided:

"The amount of such income, earnings and profits shall be determined as follows:

"From the revenue the Lessee shall at the end of each quarter year * * * deduct *in the order named:*"

(We summarize)

1. Rentals actually paid by Lessee under leases approved by the Commission;

2. Taxes;¹⁶

3. Operating expenses exclusive of maintenance;

4. Charges for maintenance of both *the Railroad* and the Existing Railroads;

5. Charges for depreciation of *the Railroad, the equipment,* and the Existing Railroads;

6. To be retained by the Lessee: $\frac{1}{4}$ th of \$3,500,000, representing the average income from

¹⁶ The full provision as to "taxes" is set forth at page 77, *infra*.

operation of the Existing Railroads (i. e., the company-owned lines as they existed at the time of execution of the contract);

7. To be retained by the Lessee: $\frac{1}{4}$ th of 6% per annum on (a) the Lessee's contribution to cost of construction of the Railroad, (b) cost of equipment furnished by the Lessee, (c) cost of extensions and additional tracks constructed by the Lessee, and (d) cost of reconstruction of Existing Railroads (*out of which quarterly payments the Lessee is required to amortize such costs*);

8. To be retained by the Lessee: $\frac{1}{4}$ th of the actual annual interest payable by Lessee upon the cost of additional equipment, plus an amortization charge;

9. To be paid to the City: $\frac{1}{4}$ th of the annual interest payable by it upon its share of the cost of construction of the Railroad plus an amortization charge;

10. To be paid to the City: $\frac{1}{4}$ th of the annual interest payable by the City upon cost of construction of additions to the Railroad plus an amortization charge;

11. 1% of the gross receipts, to be paid into a contingent reserve fund.

In connection with the above allocation provisions, Contract No. 4 provided (Art. LI, p. 66) that if in any quarter the gross receipts should be insufficient to meet the various obligations and deductions above recited, the

deficits should be cumulative, and payment thereof should be made in the order of priority above set forth.

The contract further provided (pp. 82-89) that the City might at any time; after ten years from the date of beginning of operation, terminate the contract, on one year's notice. In the event of such termination, the City is required to repay to the Lessee (appellant) 115% of the costs to appellant of the construction and equipment of the City-owned lines for "initial operation", as such term is used in the contract, less the portion thereof amortized at the time in accordance with the amortization tables contained in the contract, and 107½% of the cost of additional equipment provided by appellant for the City-owned lines, less the portion of such cost amortized at the time in accordance with the amortization table and provisions applicable to the cost of additional equipment. *These amortization tables operate arbitrarily, regardless of whether the amortization is actually earned by the combined system or received by the appellant through the preferential payments allocable to appellant under subdivisions 7 and 8 of the gross receipts allocation provisions.* Under such tables, the amount of the costs to the appellant of construction and equipment of the City-owned lines for "initial operation", which the City is required to repay in the event of termination, *decrease one-thirty-ninth (1/39) each year, commencing the first year after the expiration of the ten-year period, so that at the end of the thirty-nine year amortization period, that is, at the expiration of the contract, the City has to repay no part of such costs, and similarly, the costs of additional equipment provided by the appellant for the City-owned lines, which the City must repay to the appel-*

lant upon termination or at the expiration of the contract, decreases by a percentage approximately equivalent to one-thirty-ninth ($1/39$) thereof each year, starting on the date such additional equipment is provided and placed in operation (Contract No. 4, pp. 82-89, 93-94).

It will thus be noted that Contract No. 4 clearly contemplated that, no matter whether it should run to its expiration date or be previously terminated by the City, the appellant at least would have the opportunity, through the deductions in its favor from the pooled revenues (*i. e.*, subdivisions 7 and 8 of the gross receipts allocation provisions; Contract No. 4, pp. 63-65) and by the obligation of the City to make repayment of the unamortized portions of such costs in the event of prior termination, to recoup its investments in the City-owned lines and equipment. It will be further noted that the necessary effect of any action by the City which directly disturbs the gross receipts allocation provisions to the prejudice of appellant not only would advance the City to an unwarranted preferential position in the order of the deductions but would upset the essential scheme of the contract on the basis of which the appellant floated the securities so as to provide the money for its investment in the joint enterprise; and that if there exists power to take such action, through the guise of a tax or otherwise, the appellant and the holders of its bonds are almost completely at the mercy of the City.

It was also provided by the Rapid Transit Act (Section 27(5)), in express terms made a part of the contract, that any moneys coming to the City from the railroads operated under the contract (R. 20)—

"* * * shall be applied first to the payment of the interest upon bonds issued by said city for the construction and equipment of said road as hereinafter provided for, * * * and the remainder of said rental and moneys * * * shall be securely invested and, with the annual accretions of interest thereon, shall constitute a sinking fund for the payment and redemption at maturity of the bonds issued as aforesaid * * *."

Prior to the making of Contract No. 4, its validity, as well as the validity of Contract No. 3, was challenged in a taxpayer's action brought to enjoin its execution on behalf of the City. In *Admiral Realty Co. v. City of New York*, 206 N. Y. 110, 99 N. E. 241, *supra*, the validity of both contracts was sustained, including the provisions of Contract No. 4 with respect to preferential payments to the Lessee and the equal division of net profits between the City and the Lessee, which were attacked on the ground, among others, that the contract constituted an illegal partnership between the City and the Lessee. Conceding, in effect, that the contract was in the nature of a joint venture, the court stated (p. 135) that the contract was required in the public interest, that if the City

"has a right to contract with the lessee of its roads that such lessee shall subject its own system to a single fare it has a right to bargain for proper compensation to be given for the privilege thus secured,"

and held that the arrangement was within the City's authority.

In sustaining the challenged provisions of Contract No. 4, the Court of Appeals emphasized the very sub-

stantial consideration given therefor by the Lessee, pointing out that the cost of constructing the new City-owned roads would be about \$100,000,000, of which the Lessee was obligated to contribute \$13,500,000 plus the cost of construction of a connection of two divisions of the system (Art. XI, p. 21), and that the cost of the necessary equipment for such roads would be about \$25,000,000, all of which the Lessee was obligated to contribute, and that the Lessee was to spend at least \$26,000,000 on its own properties (206 N. Y. at 133-134, 135).

C. The City, as a party to Contract No. 4, is as fully bound thereby as appellant, and it is precluded by the contract clause of the Federal Constitution from imposing any tax upon appellant which violates the terms of the contract.

The proposition that the same standards of conduct which govern individuals in their contract relations apply to governments when they enter into contracts with individuals was stated at an early date by Alexander Hamilton, as follows (3 Hamilton's Works, 518-519):

"When a government enters into a contract with an individual, it deposes, as to the matter of the contract, its constitutional authority, and exchanges the character of legislator for that of moral agent, with the same rights and obligations as an individual. Its promises may be justly considered as excepted out of its power to legislate unless in aid of them. It is in theory impossible to reconcile the idea of a promise which obliges, with the power to make a law which can vary the effect of it."

The same rule appears in the *Sinking Fund Cases*, 99 U. S. 700, 718-719, and *Hall v. Wisconsin*, 103 U. S. 5, 11,

in which latter case the Court stated, on authority of *Davis v. Gray*, 16 Wall. 203, that—

“When a State descends from the plane of its sovereignty, and contracts with private persons it is regarded *pro hac vice* as a private person itself, and is bound accordingly.”

More recently the doctrine was applied in *Perry v. United States*, 294 U. S. 330, where it was held that the sovereign power to regulate the currency could not be so exercised by the United States as to abrogate the terms of its contract embodied in Liberty Loan Bonds. There this Court said (p. 352):

“When the United States, with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments. There is no difference . . . except that the United States can not be sued without its consent.”

In accord with these doctrines, a municipality is not only bound, as is an individual, by the terms of its contract, but it is precluded by the contract clause from exercising any of its sovereign powers, including the tax power, in such a fashion as to impair the obligation of any such contract. Thus, in *Murray v. Charleston*, 96 U. S. 432, it is said (p. 444):

“ . . . The constitutional provision against impairing contract obligations is a limitation upon the taxing power, as well as upon all legislation, whatever form it may assume. Indeed, attempted State taxation is the mode most frequently adopted to affect contracts contrary to the constitutional inhibition. It most frequently calls for the exercise of our supervisory power.”

See also:

State Tax on Foreign-held Bonds, 15 Wall. 300;
Hartman v. Greenhow, 102 U. S. 672.

As will be made clear later (pp. 75-76, *infra*), appellant's contention that the obligation of Contract No. 4 has been impaired does not rest on an *implied contract of exemption* from the tax in question, but even if it did, we believe that the contention would be well-founded. While, concededly, an exemption from taxation is not lightly to be implied, the contract clause protects *implied* as well as *express* agreements (*Robertson v. Miller*, 276 U. S. 174; *Fisk v. Jefferson Police Jury*, 116 U. S. 131), and it must be enforced by the courts whenever it clearly appears that the challenged tax defeats the intention of the parties as set forth in the contract.

The applicable rule appears in *Metropolitan Street Ry. Co. v. New York*, 199 U. S. 1, where the Court, quoting from *Wells v. Savannah*, 181 U. S. 531, 539, said (p. 36):

"The payment of taxes on account of property otherwise liable to taxation can only be avoided by clear proof of a valid contract of exemption from such payment * * *. The facts proved must show either a contract expressed in terms, or else it must be implied from facts which leave no room for doubt that such was the intention of the parties and that a valid consideration existed for the contract. * * *"¹⁶

In the case at bar there is "no room for doubt."

¹⁶ In certain cases it has seemingly been broadly stated, contrary to the statement above quoted, that a tax exemption is never to be *implied*. Reference to such cases, however, will uniformly show that the particular contract involved gave rise to no implication in fact of the exemption claimed. Thus, in *Memphis Gas Co. v. Shelby County*, 109 U. S. 398, the Court pointed out (p. 401) with respect to the tax exemption there claimed that there was not "even the most remote implication of such exemption." See also cases, pages 88-90, *infra*.

D. The Local Laws violate the express agreements of the City as to the allocation of the gross receipts of the combined system.

It is clear that by the grant of an ordinary street railroad franchise, which is nothing more than a consent to use the public streets for a designated purpose (usually for a consideration), a city does not, without more, divest itself of its right to tax the franchise. That is, the mere grant of a franchise gives rise to no implied agreement by the city not to tax the privilege granted since, presumably, the recipient of the franchise takes it, like anyone who acquires property, subject to the city's power to tax it "in common with all other privileges and property." *Puget Sound Co. v. Seattle*, 291 U. S. 619, 627.

The contract here involved, however, is far different from the ordinary grant of a franchise. It is, in effect, a continuing joint venture or partnership agreement between the City and appellant,¹⁷ by which the latter has undertaken to operate its railroads and certain City-owned railroads as a combined system for a period of 49 years, at an irrevocably limited fare, and on the faith of which the appellant has contributed many millions of dollars and issued many millions of securities; by which *all* the receipts of the combined system are allocable according to a formula *which gives certain preferentials to appellant*; and by which the City, as part of its consideration for contributing many millions of dollars to the joint enterprise, is entitled to interest and sinking fund on its investment and to participate in any profits.

¹⁷ Recently, in *Interborough Rapid Transit Co. v. City of New York*, 252 App. Div. 94 (1st Dept., 1937), Contract No. 3 was described as "an intricate plan for the building, equipment and running of a railway system on a profit-sharing basis for a long term of years."

In specific, detailed terms, Contract No. 4 provides for the disposition and allocation of the *entire gross receipts* from the operation of the combined system, in whatever manner derived. Under such allocation, appellant is to receive certain preferential payments before the City is entitled to any portion of the earnings of the joint enterprise. The City, in levying a tax on appellant of 3% of its gross receipts, is necessarily changing the agreed allocation. By the imposition of such tax, the City is not only demanding an additional 3% of the gross receipts of the enterprise, leaving but 97% for distribution as provided by the contract, but is insisting that the 3% shall be paid to it first, so that the priorities established by the contract are nullified. In brief, by the tax in question, the City has repudiated the contract both as to the share of gross receipts it was to receive and the priority which appellant was to enjoy, so that, if the challenged tax be sustained, the revenues collected by appellant are not to be distributed according to the terms of Contract No. 4, but according to the wishes of the other party to the contract as expressed many years after the execution thereof.

The extent of the repudiation and its effect upon appellant is partially shown by the fact that the 3% tax for the eighteen months' period here involved so reduced the revenues in the gross receipts "pool" as to deprive appellant of the current interest and sinking fund allowances provided for by subdivisions 7 and 8 of Article XLIX (pp. 63-65) of the contract, to the extent of over \$635,000 (R. 19-20).

The large sum of money of which appellant was thus deprived does not represent "profits" which appellant would otherwise have earned. On the contrary, it repre-

sents, in major part, *a loss of interest and sinking fund on invested capital which, almost certainly, it will never be able to recover.* By Contract No. 4 appellant was required to contribute \$13,500,000 toward the cost of constructing the City-owned lines, plus the cost of construction of a physical connection between two subdivisions of the City-owned line, and to furnish all equipment necessary to operate the City-owned lines, the title to such equipment to vest immediately in the City (pp. 63-64, *supra*). Pursuant to such obligations appellant has invested millions of dollars (in fact, in excess of \$50,000,000, although this amount does not appear in the complaint) in real and personal property which, at the expiration of the contract in 1969, *will revert to the City without payment.* The contract contemplated the amortization of this large investment out of the annual preferential payments to appellant prescribed by subdivisions 7 and 8 of the gross receipts allocation formula (Art. XLIX, pp. 63-65). As a consequence of the challenged tax, however, preferential payments due to appellant have been diverted to the City, with the result (*a fortiori*, the longer the challenged tax is continued) appellant may never recover the contemplated amortization payments. The potential and, indeed, fairly certain, consequence of the tax, if valid and continued, is that appellant will stand to lose, in major part, its huge additional investments in City-owned property.

It is not our contention that Contract No. 4 exempts appellant or its property from taxation generally. We do assert, however, that the City, the other party to Contract No. 4, may not, in the exercise of its governmental power, subject appellant to the payment of *a tax on or measured by the gross receipts of the combined system of railroads*, since such a tax not only changes the basic provisions of

the contract but would, if sustained, place the City in a position to destroy the contract itself.

Appellant's contention that the challenged tax impairs the obligation of Contract No. 4 is not founded on a claim of implied exemption from the particular tax in question, but rather on a clear violation by the City of its affirmative covenants. This follows from the fact that the tax is on the gross receipts of the enterprise, so that thereby 3% of such receipts are entirely removed from the allocation mechanism of the contract. More specifically, we contend that, by providing in specific terms for the disposition and allocation of the entire gross receipts, the parties necessarily precluded any kind of tax or charge by the City which would directly and specifically alter such disposition and allocation, to appellant's prejudice, except in so far as any such tax or charge *may clearly be said to have been provided for in the contract provisions as to the disposition of gross receipts*. To state it differently, the City, by reason of its affirmative covenants, has precluded itself from changing the allocation of gross receipts and the priorities agreed to by it unless the appellant has clearly consented to the imposition of the kind of tax here challenged. A study of Contract No. 4 reveals no such consent.

The court below accepted as satisfactory evidence of an intent of the parties that the City should have the power, through the form of a tax, to change the basic contract provisions, the second gross receipts allocation clause (subd. 2 of Art. XLIX, p. 60), which provides for the deduction from gross receipts, prior to any preferential payments either to appellant or the City, of "all taxes or other governmental charges" assessed against appellant. Said provision reads as follows:

"2. Taxes, if any, upon property actually and necessarily used by the Lessee in the operation of the Railroad and the Existing Railroads, together with all taxes or other governmental charges of every description (whether on physical property, stock or securities, corporate or other franchises, or otherwise) assessed or which may hereafter be assessed against the Lessee in connection with or incident to the operation of the Railroad and the Existing Railroads. Also such assessments for benefits as are not properly chargeable to cost of construction or cost of equipment."

While unquestionably this provision assures that taxes of whatever kind lawfully imposed upon appellant or its property shall be deductible from the revenues before allocation of the earnings of the joint venture as between appellant and the City, and to that extent, of course, contemplates that appellant shall be subject to taxation, it clearly does not, and cannot be construed to, constitute a consent to the changing by the City at will of the basic provisions of the contract through the guise of a tax in direct conflict with such provisions; nor does it deprive appellant of its right to resist on constitutional or legal grounds any tax or assessment which may be imposed upon it or its property any more than the provision for the prior deduction of operating expenses (see p. 65, *supra*) would deprive appellant of its right to resist liability on damage or other claims constituting part of such expenses.

In the first place, it should be borne in mind that the tax deduction clause above quoted is but part of the allocation formula by which the "income, earnings and profits" of the joint venture are to be determined, and

that it is not, and does not purport to be, an agreement or consent in advance to the imposition on appellant of any and every character of tax which might conceivably fall within the limits of the language of the clause, or, indeed, an agreement or consent to the imposition on appellant of any tax whatever. Nor was the provision intended to preclude appellant from contesting an invalid, discriminatory or otherwise improper tax, whether Federal, State or City, any more than the clause permitting prior deduction of operating expenses was intended to preclude the City from contesting improper deductions which appellant might attempt under guise of that clause. On the contrary, since the City and its property were tax-exempt (N. Y. Cons. Laws, Ch. 60, Par. 4), the clause was plainly intended for the protection of appellant, to the end that such taxes as were properly imposed on appellant would be a charge against the gross receipts "pool", i. e., the enterprise itself. Accordingly, the tax deduction clause may not properly be viewed as a consent to the imposition of taxes. *A fortiori*, it may not be construed as a consent in advance to an extraordinary kind of tax which would directly change the vitally important agreed allocations of gross receipts and place one party to the contract wholly at the mercy of the other.

Further, and altogether persuasive, evidence that the tax deduction clause was not intended as a consent by appellant that the City should have the power, through the form of a tax, directly to change the gross receipts allocation provisions is found in the circumstances under which Contract No. 4 was executed and the extraordinary practical, and wholly peculiar, effect upon appellant and Contract No. 4 of the challenged tax; evidence which also establishes that there would be no valid basis for holding

that the tax deduction clause contemplated the imposition on appellant of the challenged tax even if such clause were (wholly improperly, we submit) to be regarded as an agreement on the part of appellant that it might be subjected to any tax which might fall within the descriptive area thereof.

When Contract No. 4 was executed in 1913, the City was wholly without power, and indeed had never possessed the power, to levy or impose indirect or excise taxes of any kind (R. 20), this being a power which had always theretofore been reserved to the State itself. When the contract was made, the tax power of the City was confined to special assessments for public improvements and *ad valorem* taxes on real estate and special franchises issued by the City.¹⁸ It was not until twenty years later that the City, when confronted with the widespread emergency due to unemployment, was, for the first time in its history, given "authority to enter the field of indirect or excise taxation," by virtue of the grant of the wholly novel and extraordinary power to impose any additional taxes which the legislature itself could impose. *New York Steam Corp. v. City of New York*, 268 N. Y. 137, 144; 197 N. E. 172, 174; *Brooklyn Bus Corp. v. City of New York*, 274 N. Y. 140, 146-147; 8 N. E. (2d) 309, 312. It is alleged in the complaint, *as a fact*, that the parties to the contract never contemplated that the City would ever have the extraordinary power thus conferred upon it

¹⁸ When the contract was executed, appellant annually paid, and has since continued to pay, two separate taxes imposed by the State for the privilege of exercising its corporate franchise (R. 13). When the contract was executed, the City had the power to impose, and did annually impose, on appellant real estate taxes and special franchise taxes for the use of the streets for transportation (R. 13); and the public records of the Transit Commission show that during the eighteen months' period here involved, appellant paid to the City real estate taxes and special franchise taxes in the respective aggregate amounts of \$820,770.14 and \$929,018.72.

(R. 20). *A fortiori*, it was never in fact contemplated that the City would ever be vested with the power to impose on appellant *an excise tax* for the privilege of *carrying out its obligations under the contract and measured by its gross income*. In this connection it may be pointed out that the State courts have held that the right of a private corporation to operate City-owned railroads is not subject to tax as a special franchise. *People ex rel. Interborough R. T. Co. v. Tax Com'rs.*, 126 App. Div. 610, 110 N. Y. Supp. 577, aff'd 195 N. Y. 618.

In its inherent character and effect the challenged 3% gross income tax is wholly unlike any tax which the City ever has previously imposed, or which it ever before had the power to impose. Both the City real estate tax and the City special franchise tax above mentioned are *ad valorem* taxes, based upon and measured by valuation of property; in the one case, by the value of the real estate, and in the other, by the value of the special franchise. In each case the valuation is determined by an administrative board (in the case of the special franchise tax, by a State authority in Albany), and appellant has the right to be heard and a right of review. The continued imposition on appellant of such taxes (being essentially operating expenses which logically should be deducted from gross income in order to determine the earnings available for distribution to the joint owners of the enterprise), was clearly contemplated by Contract No. 4, since there is nothing therein to suggest that property owned by appellant was not to bear its fair share of the general tax burden.

The 3% tax now in question is of a wholly different character. In terms it is an "excise tax" levied on appellant's "privilege of exercising its franchise or fran-

chises, or of holding property, or of doing business" (p. 4, *supra*). Since appellant exercises its franchise, holds its property, and does business for the sole purpose of carrying out Contract No. 4 (R. 3, 6), and since the tax affects every transaction of appellant and reaches every portion of the gross receipts of the combined system, it imposes a direct burden on every transaction involved in the performance of Contract No. 4 (*United States Glue Co. v. Oak Creek*, 247 U. S. 321, 328; *Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550, 558), and is in substance a tax imposed upon appellant for the privilege of carrying out the contract.¹⁹

The due and proper performance of Contract No. 4 is in no sense impeded or impaired by a City *ad valorem* tax on appellant's properties or franchises; and, in not making provision in the contract for exemption from such taxes or from taxes generally, *notwithstanding it had limited itself irrevocably to a fixed fare for the full term of the contract*, appellant was merely accepting a tax burden common to all owners of property. It was justified in so doing in the knowledge that its property and special franchises would have to be taxed on the same basis as other like property.

On the other hand, the very foundations of Contract No. 4 are imperiled and, we contend, may be destroyed by the imposition by the City, the other party to the joint venture, of a tax levied on the privilege of performing the contract

¹⁹ Whatever may be the precise legal character of the tax, it is safe to say that it is either a direct tax on gross receipts, or a tax on the transactions which give rise to such receipts, or a tax on the privilege of doing business measured by the gross receipts. See *Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550. Whichever view is taken, it is clear that the tax is to be dealt with according to its "practical operation." *Quaker City Cab Co. v. Penna.*, 277 U. S. 389, 401; *Mountain Timber Co. v. Washington*, 243 U. S. 219, 237. In its practical operation, the tax is clearly one on the contract itself.

and *measured by the gross receipts* of the joint enterprise. If the City, the other party to the contract, may validly impose a 3% gross receipts tax on appellant, it may impose a similar tax of 20%, or of 50%, or more.

The only sources of revenue available to appellant for the payment of the interest on its investments under Contract No. 4 (represented by outstanding bonds) in the construction and equipment of the City's lines as well as in its own railroads, and for the amortization of such investments, are the pooled revenues allocated to it under the sixth, seventh and eighth allocation provisions of Article XLIX (pp. 63-65). Such lines of the City and their equipment revert to the City at the expiration of the contract, *without the repayment by it of any part of the appellant's investments therein*, except that the City is required to repay the *unamortized portion* of cost of additional equipment provided by the appellant and in operation less than the thirty-nine year amortization period of the contract. This is true whether or not the portions of the pooled revenues allocated to the appellant have been earned or received (see pp. 66-68, *supra*). To hold, therefore, that the City may impose a tax on the gross receipts of the joint enterprise, and thereby change the order of preferential deductions, would be equivalent to a holding that the City in such manner may not only obtain free use of the investments of the appellant and its bondholders in the City-owned lines as well as its own railroads for the term of the contract but may, in effect, confiscate such investments. The mere statement of the proposition is the strongest proof of its inequity, and shows conclusively that the parties to the contract could not have contemplated or intended any such one-sided relationship.

In addition to the sharp dissimilarity between the challenged tax and taxes within the power of the City to impose at the time Contract No. 4 was executed, additional evidence in support of our contention is found in the extraordinary practical effect upon appellant of a tax measured by gross income.

Although all receipts from appellant's operations are originally collected by appellant, such receipts fall initially into a "pool" for use or distribution according to the gross receipts allocation provisions of Contract No. 4, so that, initially, appellant acquires no title to or beneficial interest therein but holds them merely as a common disbursing agent. Under the contract none of such receipts is available for the private uses of appellant until the requirements of the first five subdivisions of the allocation provisions have been met. Under the first three of such subdivisions, appellant is required to apply the pooled receipts to the payment of "rentals", "taxes" and "operating expenses", in the order named. Under the fourth subdivision, appellant is required to set aside 12% of the "revenue" for the maintenance, exclusive of depreciation, of *both* the City-owned and the company-owned lines; and under the fifth subdivision, to set aside, in specified sinking funds, an amount for depreciation of *both* the City-owned and company-owned lines (Art. XLIX, pp. 60-63). The amount so deducted from the pooled revenues for depreciation of the City-owned lines is paid over directly to an independent depreciation fund board, constituted under the contract, and, while reserved by said board for the renewal or replacement of principal parts of the City-owned lines, is, under the express provision of the contract, the property of the City from the beginning (Art. XLIX, pp. 60-63).

It is thus clear that under the contract, before any receipts collected by appellant are available for its private uses, it is required to set aside from such receipts sufficient amounts thereof to take care of all maintenance and depreciation charges accruing in respect of the many millions of dollars of City-owned properties. Plainly, revenues (in which appellant has no beneficial interest and which are but temporarily in its possession as a disbursing agent) applied by appellant to the maintenance and replacement of City-owned properties do not in any way represent income of appellant but are income of the City. The situation is thus one where, by reason of the challenged Local Laws, appellant has been forced by the City to pay a gross income tax in *respect of income actually belonging to and received by the taxing authority itself.*

It should be borne in mind that, under the law of New York, property owned by the City is, and since a time prior to the execution of Contract No. 4 has been, exempt from taxation (Cons. Laws, Ch. 60, par. 4). There is cogent reason for not permitting exemption from taxes on property of the taxpayer which is "otherwise liable to taxation" (see *Metropolitan Street Ry. Co. v. New York*, 199 U. S. 1, 36) except upon clear proof of a contract of exemption from the payment thereof. Where, however, the challenged tax in substantial part is not only not measured by, but actually levied in respect of, property and income of another and, incidentally, upon property and income of the taxing authority itself and not otherwise subject to taxation, every presumption should be indulged, we submit, in favor of the claimed exemption.

Further evidence of an intent to preclude a tax on or measured by gross income of the system is found in the provision of the Rapid Transit Act, expressly made a part

of Contract No. 4, which requires the City to use all earnings which it shall receive from appellant's operations for payment of interest and principal of the City's bonds issued to finance the construction of the City-owned railroads (p. 68, *supra*). An intention to permit the flouting of this provision, as well as the legislative mandate, by permitting the City, through the guise of a tax, to take the first 3% of the gross receipts for a purpose (i. e., unemployment relief) wholly foreign to that prescribed by the Legislature is clearly not to be imputed to the parties.

We do not here complain of the 3% tax because it renders appellant's operations unprofitable; such result might be caused by a sufficiently high real estate tax. Nor do we complain because the tax, by decreasing appellant's earnings, tends to destroy the value of its franchise in a way that the value of *any franchise* may be destroyed by a tax. The basis of our complaint is that, by reason of the special character of appellant's contract and the wholly novel effect of the particular Local Laws thereon, the tax exacts something from appellant which is not exacted from the owners of franchises generally; that the tax operates to destroy appellant's contract in a way *peculiar to appellant's particular contract*; and that, indeed, the challenged exaction, as to appellant, is not really a tax at all, but a direct alteration of the principal terms of the contract by one of the parties thereto, or, in other words, an attempt to rewrite the contract.

The moving consideration for appellant's contribution of millions of dollars and its undertaking to limit itself to a stated fare of five cents for 49 years, and, indeed, the very keystone of Contract No. 4, was the agreed arrangement as to the disposition of all gross receipts and the declared preferentials in favor of appellant. Contingent upon

the faithful carrying out of such arrangement was not merely appellant's chance to make a *profit* upon its huge investments but the return or recovery of a large portion (i. e., the cost of the equipment and its contribution to the cost of construction of the City-owned lines) of the original investment itself. If, by the exertion of a wholly extraordinary taxing power not in existence, if indeed dreamed of, when Contract No. 4 was made, the City can impose a tax on or measured by the gross receipts of the joint enterprise, the City is in a position at any time to frustrate the basic scheme and purpose of the contract. A situation would thus exist *where one party to the contract would be wholly at the mercy of the other party*; where all mutuality of obligation, in an important public contract solemnly entered into under legislative sanction, would be wholly destroyed; where appellant's gross receipts would be disposed of, not as Contract No. 4 provides, but as the City may from time to time in its wisdom determine; where the appellant could be rendered wholly unable to pay the interest and amortization charges on the bonds representing its investments in the City-owned lines and equipment; where the appellant's rapid transit railroads comprised in the combined system, including its additional investments therein under the contract, would be subjected to use for the benefit of the City for the remainder of the contract term, without any return thereon or compensation for such use to the appellant; where City-owned lines and equipment produced by the expenditure of millions of dollars of the appellant's money, or rather the money of its bondholders, would go to the City without any payment by it and without the appellant being permitted to receive either interest or sinking fund charges thereon; and where appellant, operating under an irrevocably limited fare, would be utterly helpless.

This is true for the simple and conclusive reason that, if the City can impose a tax on the gross receipts of the joint enterprise and require that it be paid out of the pooled revenues under the second subdivision of the gross receipts allocation provisions (pp. 65-66, 76-77, *supra*), that is, the tax deduction clause, it may wipe out the subsequent deductions in favor of the appellant and destroy its only sources of revenue.

The courts, it has often been said,—

“* * * always avoid, if possible, any construction of a contract that is unreasonable or inequitable, and especially one that will place one of the parties at the mercy of the other.” (*Simon v. Etgen*, 213 N. Y. 589, 595, 107 N. E. 1066, 1068).

Applying this rule, and keeping in mind (a) that when the contract was executed “The parties * * * were contracting according to the terminology and the power existing at the time” (*Brooklyn Bus Corp. v. City of New York*, 274 N. Y. 140, 147, 8 N. E. (2d) 309, 312), and (b) that the function of this Court is to ascertain the meaning which, in light of all the circumstances, “might reasonably have acceptance by men of common understanding” (*Hale v. Iowa State Board*, No. 16, present term, decided Nov. 8, 1937), Contract No. 4 may not reasonably be interpreted as authorizing the City, by a purported exertion of its tax power, to impose on appellant any kind of tax which would directly and immediately alter the allocation provisions to the advantage of the City and lay the ground for destroying the contract itself. More specifically, the contract may not reasonably be interpreted as contemplating the imposition by the City (*a fortiori*, under an extraordinary, emergency power never before possessed) of any

tax on appellant based upon appellant's right to perform the contract and *measured by the gross receipts of the joint enterprise*. On the contrary, full meaning may be given to all the provisions of the contract, including the tax deduction clause, and *without any substantial curtailment of the City's tax powers*, if the contract be understood to contemplate the imposition on appellant of taxes of the general kind and character which the City was empowered to impose when the contract was executed, and such other taxes as the City may now or hereafter have power to impose which do not have the effect of *changing the essential nature of the contract, or of destroying it, or of forcing upon appellant the burden of a tax in respect of the tax-exempt income of the City itself*.

The present case, in principle, and, indeed, in fact, is not unlike *Murray v. Charleston*, 96 U. S. 432. There the city had issued shares of corporate stock which were, in effect, certificates of indebtedness bearing interest at 6%. Subsequently, the city imposed a tax of two cents upon the dollar of the value of all real and personal property in the city and directed that the tax assessed on the city stock should be retained by the city treasurer out of the interest thereon when due and payable. Although there was no express covenant in the city's stock, or in the ordinance under which it was issued, not to impose taxes thereon, this Court held that the city could not, under the guise of taxation, change its agreement to pay 6% interest into one to pay 4% interest, and that the tax ordinance impaired the obligation of the city's contract. In reaching this conclusion the Court said (p. 444):

"A change of the expressed stipulations of a contract, or a relief of a debtor from strict and literal compliance with its requirements, can no more be

effected by an exertion of the taxing power than it can be by the exertion of any other power of a State legislature.”

It further said (p. 445) that—

“ * * * A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity.”

So, in the case at bar, it may be said that the City's promise that the receipts collected by appellant should be divided in a designated manner “with a reserved right to deny or change the effect of the promise, is an absurdity.” So, too, it must here follow that the City's preemption of the first 3% of such receipts before they were ever “reduced into possession” of the gross receipts pool, thus lifting them entirely from the operation of the allocation formula, is a “change of the expressed stipulations of a contract.”

In principle, *Chicago v. Sheldon*, 9 Wall. 50, is also applicable. That case involved an ordinance by which the city granted to a railway company the right to construct and operate a railway in certain city streets on designated conditions, one of which was that the company should—

“ * * * as respects the grading, paving, macadamizing, filling, or planking of the streets, or parts of the streets, upon which they shall construct their said railways, or any of them, keep eight feet in width along the line of said railway on all the streets wherever one track is constructed, and sixteen feet in width along the line of said railway where two tracks are constructed, in good repair and condition * * * ” (Italics of the Court.)

Upon being subjected to a special assessment by the city for a new paving of a street along which its railroad ran, the company, in an action to contest the assessment on the ground that it impaired the obligation of its contract with the city, asserted that, since its contract merely required it to keep the street *in repair* it could not be made to participate in paying for a *new paving* thereof. The city contended that the company was not entitled to an exemption from the assessment *in the absence of an express contract to that effect* (p. 53). This Court rejected the latter contention on the ground that the provision as to repairs of streets must be deemed to have been understood as regulating the whole subject of street improvements and to limit the liability of the company to the specific kinds of improvements enunciated in the contract.

In *Murray v. Charleston, supra*, the Court stated (p. 448) that—

“There is no more important provision in the Federal Constitution than the one which prohibits States from passing laws impairing the obligation of contracts, * * *.”

and that—

“* * * Complete effect must be given to it in all its spirit.”

If the tax deduction provision of Contract No. 4, which signifies nothing more nor less than an intention that the pooled revenues should be chargeable with whatever taxes might lawfully be assessed against appellant or its property, and which plainly was couched in general terms for the benefit of appellant rather than the City (pp.

77-78, *supra*), be interpreted as indicating a consent by appellant to the imposition of a tax of the extraordinary character and effect of that here involved, then, we submit, form will have prevailed over substance, and words of generality in an isolated sentence, designed for a different purpose, will have been permitted to defeat the basic purpose of the entire contract.

As above stated, our claim as to the impairment of Contract No. 4 does not rest on an implied exemption from the tax but on an affirmative violation of the City's express covenants. The contract in and of itself, without the necessity of express language, is a covenant on the part of the City not to destroy it and not to prevent the appellant from performing it. We further assert, however, that our contention is not defeated even if it be held to rest on an implied covenant.

The basis of the rule that tax exemptions will not be lightly implied is the reluctance of the courts to permit impairment of the tax power, which is an attribute of sovereignty. But the cases cited (pp. 71-72, 88-90, *supra*) show clearly that the rule is only one of construction, and that like all such rules it must yield to the intention of the parties whenever and however such intention clearly appears. When a municipality discards its governmental role and acts in the role of a private person no reason appears why such municipality should not be held to have abandoned its sovereign status to the extent necessary in order to keep faith with persons with whom it has dealt on a proprietary basis.

If, when a sovereign "descends from the plane of its sovereignty" and enters into a contract with a private

individual, it is subject to the same responsibilities in respect of such contract as such private individual, as the authorities cited (pp. 70-72, *supra*) hold, it follows that the sovereign, like any other contractor, is under a duty *to do nothing which will render performance by the other party more burdensome or deprive him of the fruits of the contract.*

“ * * * in every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing.” (*Kirke LaShelle Co. v. Armstrong Co.*, 263 N. Y. 79, 87, 188 N. E. 163, 167.)

See also, *Manners v. Morosco*, 252 U. S. 317; *Uproar Co. v. National Broadcasting Co.*, 81 F. (2d) 373 (C. C. A. 1st).

It cannot be disputed that the imposition by the City of a tax on or measured by the gross receipts of the combined system, unlike any other kind of tax, *directly* disturbs the agreed allocation thereof by giving the City a preferential payment, to the extent of the tax, *ahead* of the preferentials accorded to appellant by the contract. Since there is no limit, not even that of confiscation (pp. 36-37, *supra*), upon the rate of any such tax, once the power to impose it is conceded, and since appellant is utterly without power to escape any part of the burden of the tax by an increase of fare, by extending its lines of railroad, or otherwise, any such tax is potentially completely destructive of the entire consideration to appellant for entering into the contract. Once such a tax is sustained, the appellant is wholly at the mercy of the City. The mutuality of the

contract will have been destroyed and the appellant would be able to continue in business only on such basis as the City may determine. In no clearer, more effective way, could appellant be deprived of the "fruits of the contract" in violation of the obligation of good faith implied therein.

CONCLUSION

The allegations of the complaint show that the challenged Local Laws violate the appellant's constitutional rights and accordingly the complaint states facts sufficient to constitute a cause of action. The judgment appealed from should be reversed.

Respectfully submitted,

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January, 1938.

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CHARLES ELMORE GROPLEY
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Supreme Court of the United States

October Term, 1937—No. 435.

NEW YORK RAPID TRANSIT CORPORATION,
Plaintiff-Appellant,

against

THE CITY OF NEW YORK,
Defendant-Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW YORK.

APPELLEE'S BRIEF.

February 2, 1938.

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INDEX.

	PAGE
Opinions Below _____	1
Jurisdiction _____	1
Question Presented _____	2
Statutes Involved _____	2
Statement _____	2
1. The amended complaint _____	3
2. The defendant's motion to dismiss the complaint _____	6
3. The opinion of the Court of Appeals _____	7
Summary of Argument _____	8
POINT I. The imposition of a tax at different rates upon utilities and other businesses does not violate the equal protection clause of the Fourteenth Amendment _____	9
POINT II. The imposition of a tax equal to 3% of gross income upon a class embracing both rapid transit companies and other utilities—groups which may exhibit different ratios of gross to net income—does not violate the Fourteenth Amendment of the Federal Constitution _____	17
POINT III. The Local Laws do not violate the obligation of contracts clause of the Federal Constitution _____	26
Conclusion _____	30

Cases Cited.

	PAGE
Alaska Fish Co. v. Smith, 255 U. S. 44	7, 11, 25, 26
Atlantic Coast Line R. Co. v. Daughton, 262 U. S. 413	16
Atlas Television Co., Matter of, 273 N. Y. 51	12
Blackmer v. United States, 284 U. S. 421	23
Brooklyn Bus Corp. v. City of New York, 274 N. Y. 140	27
Carley & Hamilton v. Snook, 281 U. S. 66	13
Carmichael v. Southern Coal & Coke Co., 301 U. S. 495	10, 11, 12, 15
Cincinnati Soap Co. v. United States, 301 U. S. 308	8, 10, 13, 14
Exchange Drug Co. v. Long, 281 U. S. 693	18
Fox v. Standard Oil Co. of N. J., 294 U. S. 87	20, 26
Garfield v. New York Telephone Co., 268 N. Y. 549	10
Great A. & P. Tea Co. v. Grosjean, 301 U. S. 412	21
Hale v. Board of Assessment and Review, 302 U. S. 95	27
Henderson Bridge Co. v. Henderson City, 173 U. S. 592	25
Honolulu R. T. Co. v. Wilder, 36 F. (2d) 159	16
Kentucky Railroad Tax Cases, 115 U. S. 321	20
Lowry v. City of Clarksdale, 154 Miss. 155, 122 So. 195	12
Magnano Co. v. Hamilton, 292 U. S. 40	13, 26
McCray v. United States, 195 U. S. 27	7
Memphis Gas Co. v. Shelby County, 109 U. S. 398	29
Metropolis Theatre Co. v. Chicago, 228 U. S. 61	18
Metropolitan Casualty Co. v. Brownell, 294 U. S. 580	16
Nashville, C. & St. L. Ry. Co. v. Wallace, 288 U. S. 249	13
New Orleans City Ry. Co. v. New Orleans, 143 U. S. 192	30
New York Steam Corp. v. City of New York, 268 N. Y. 137	10, 12, 14
Ohio Oil Co. v. Conway, 281 U. S. 146	18

	PAGE
Powell v. Pennsylvania, 127 U. S. 678	26
Puget Sound Power & Light Co. v. Seattle, 291 U. S. 619	8, 18, 23, 29, 30
Rast v. Van Deman & Lewis Co., 240 U. S. 342	16
St. Louis v. United Railways Co., 210 U. S. 266	29, 30
Southern Boulevard R. Co. v. City of New York, 86 F. (2d) 633; 301 U. S. 703	10, 14, 16, 17, 19, 20, 29
Southern Railway Co. v. Watts, 260 U. S. 519	24
Southwestern Oil Co. v. Texas, 217 U. S. 114	7, 18
Stewart Dry Goods Co. v. Lewis, 294 U. S. 550	15, 22
Tax Commissioners v. Jackson, 283 U. S. 527	7, 16
Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194	13

Statutes.

New York Civil Practice Act, § 588	2
New York Laws, 1934, ch. 873	2
New York Laws, 1935, ch. 601	2
N. Y. C. Local Law No. 2 of 1935	2, 4
N. Y. C. Local Law No. 30 of 1935	2, 4

IN THE
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Plaintiff-Appellant,

against

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APPELLEE'S BRIEF.

Opinions Below.

The opinion of the Special Term of the Supreme Court of New York (R. 53-57) is unofficially reported in 97 N. Y. L. J. 241. The memorandum of the Appellate Division of the Supreme Court of New York, First Department (R. 59-60) is reported in 251 App. Div. (N. Y.) 710. The opinion of the Court of Appeals of New York (R. 62-68) is reported in 275 N. Y. 258, 9 N. E. (2d) 858.

Jurisdiction.

An order allowing appeal (R. 94) was signed by the Chief Judge of the State on August 24, 1937. On October 25, 1937, this Court noted probable jurisdiction.

Question Presented.

Are New York City Local Laws Nos. 2 and 30 of 1935, adopted pursuant to authority conferred by the Legislature of the State to enable the appellee to raise funds to be earmarked for unemployment relief, and imposing a tax equal to 3% of gross receipts upon the exercise of franchises by a class of public utilities which includes the appellant, *constitutional*, or do they violate (1) the due process clause of the Fourteenth Amendment, or (2) the equal protection clause of the Fourteenth Amendment, or (3) the obligation of contracts clause of the U. S. Constitution?

The State Court of last resort upheld the statutes against all three challenges. 275 N. Y. 258; R. 62-68.

Statutes Involved.

The statutes involved are set forth in the record as follows:

N. Y. Laws 1934, ch. 873, R. 28;

N. Y. Laws 1935, ch. 601, R. 30;

N. Y. C. Local Law No. 2 of 1935, R. 33;

N. Y. C. Local Law No. 30 of 1935, R. 42.

Statement.

The case is here upon appeal from a judgment of the Supreme Court, New York County, entered upon a remittitur from the Court of Appeals, State of New York, in an action for money had and received to recover taxes paid under protest on the ground that the taxing statutes are unconstitutional. To the Court of Appeals was certified (Civil Practice Act, § 588 [4]) this question (R. 59): "Does the [amended] complaint herein state facts sufficient to

constitute a cause of action?" And the question was answered in the negative, in an opinion *per* FINCH, J., concurred in unanimously. Both lower courts were reversed, interlocutory orders denying motions to dismiss the complaint were vacated, and a final order and judgment entered dismissing the complaint with costs in all courts (R. 70).

1. The amended complaint.

The amended complaint alleges that the plaintiff is a domestic corporation engaged in the operation of certain rapid transit railroads in the City of New York. Under a contract, known as "Contract No. 4," dated March 19, 1913, the City and the New York Municipal Railway Corporation agreed to build certain rapid transit railroad lines, the latter corporation becoming the operating lessee. Eventually, it went into receivership and all its assets including the lease were acquired by the plaintiff on June 14, 1923 (R. 6).

Among the obligations in the lease thus assumed by the plaintiff was the obligation to pay the City of New York 50% of the gross receipts, after deducting rentals to other railroad companies, taxes and assessments, operating expenses, and certain other fixed charges and expenses enumerated (R. 4-5).*

It is alleged in the eighth paragraph of the amended complaint that the plaintiff (R. 6-7)

"is under the supervision of the Transit Commission, which is the Metropolitan Division of the Department

* The appellant has never paid the City any interest on its investment in the railroad, or any part of its gross receipts. The City's cumulative deficit resulting from the interest and amortization payments due it by reason of its investment in the railroad under Contract No. 4 was in excess of \$140,000,000 on June 30, 1936. *16th Annual Report, 1936, Transit Commission of New York, page 85.* This report is one of the same series which appellant deems itself at liberty to cite (brief, p. 37), notwithstanding its non-inclusion in the record.

of Public Service, although said Transit Commission has no power to authorize any increase in the rate of fare which the plaintiff may charge its passengers."

Reference is then made (R. 8) to the Enabling Acts and the Local Laws of the City of New York passed thereunder, and it is alleged that Local Law No. 2 of 1935 imposes upon the class to which the plaintiff belongs * an excise tax equal to 3% of its gross income for the year 1935. By the same local law, utilities not subject to the Transit Commission or Public Service Commission are subjected to a tax of 3% of their gross operating income.

Local Law No. 2 of 1935 was reenacted to cover an additional period of time (without changes of substance) by Local Law No. 30 of 1935. Its application to the plaintiff is set forth at Record 8-10.

The provisions for the earmarking of the proceeds of the tax for unemployment relief are referred to at Record 10.

The plaintiff goes on to allege that it has paid to the City, under protest, the sum of \$1,408,697 pursuant to the local laws in question (R. 12).

Various other statutes and the taxes the plaintiff has to pay to the State and the City in order to operate under its franchises are detailed in Paragraphs 25-29 of the amended complaint (R. 13-15).

The limitation of the plaintiff to a five-cent fare is set forth at Record 15-16.

The operation of certain new municipal subway lines directly by the defendant in competition with the plaintiff is alleged at Record 16.

* That is, utilities subject to the jurisdiction of the Transit Commission or the Public Service Commission of the State.

The failure to tax taxicabs though they compete with the plaintiff is alleged at Record 17.

The fact that these taxes, though imposed for State purposes, are confined to utilities operating within the territorial limits of New York City, is alleged at Record 17-18.

As a further grievance, it is alleged (R. 18-19) that the tax operates with peculiar severity on the plaintiff because the operating and maintenance expenses of rapid transit railroads "are far higher in proportion to gross receipts than the operating and maintenance expenses of corporations engaged in other types of business but included in the same class" subjected to taxation by the local laws in question.

Inequality is pleaded in Paragraph 41 in these terms (R. 19):

"The imposition of the tax is a plainly arbitrary method of collecting money for unemployment relief purposes in the easiest way without any thought of or attempt at equal distribution of the tax burden in proportion to benefits or to capacity to pay on the part of the respective persons and corporations taxed, or to the value of the privilege taxed."

A violation of the obligation of contracts clause of the Federal Constitution is alleged at R. 20-21.

A summary of grievances is found in Paragraph 47, where it is alleged that the local laws, as well as the Enabling Acts, (1) impair the obligation of plaintiff's contract in calling for payments by the lessee not contemplated when the contract was entered into; (2) violate the due process clause in making a fair return on plaintiff's invested capital impossible, in exacting money from one group for the benefit of another group (the unemployed), in measuring the tax by gross rather than by net income, and in

taxing the plaintiff without regard to benefits received from the project the tax is aimed to support; and (3) violate the equal protection clause in that they single out one group for an especially heavy tax, they do not tax equally persons engaged in transporting passengers for hire, they do not operate throughout the State though the taxes imposed are for State purposes, they make a discrimination based on subjection *vel non* of the taxpayer to the supervision of the Transit Commission or Public Service Commission, they operate with especial burdensomeness on transportation companies because of the severity of the competition they are subjected to and because of their inability to charge more than a five-cent fare, and they tax at the same rate the gross income of different types of corporations "which are so essentially different in character that the ratio of net income to gross receipts in the case of one is radically less than in the case of another, * * *" (R. 25).

2. The defendant's motion to dismiss the complaint.

The defendant, upon due notice, moved in the court of first instance (R. 3)

"for an order dismissing the complaint herein and directing judgment for the defendant, on the grounds that the complaint does not set forth facts sufficient to state a cause of action and that the Court has no jurisdiction of this action, and for such other and further relief as to this Court may seem just and proper."

The jurisdictional question raised by the motion is, of course, no longer in the case. The Court of Appeals held (R. 63) that the Court did have jurisdiction of an action at law in the premises and that the administrative remedy of an order of certiorari to review the Comptroller's determination was not exclusive. The Court accordingly examined the amended complaint upon the merits.

3. The opinion of the Court of Appeals.

The major question was stated to be whether it was constitutional to impose a tax at the same rate upon the gross incomes of different types of corporations "which are so essentially different in character that the ratio of net income to gross receipts in the case of one is radically less than in the case of another" (Amended complaint, R. 18; Opinion, R. 64). In upholding the tax against this attack, the Court referred to the taxes which this Court had upheld in *Alaska Fish Co. v. Smith*, 255 U. S. 44 (1921), *Southwestern Oil Co. v. Texas*, 217 U. S. 114 (1910), and *Tax Commissioners v. Jackson*, 283 U. S. 527 (1931), and said that they, and many like taxes (R. 65),

"have been upheld although it is evident that the burden of the tax falls more heavily on some in the classification than on others, whether by reason of low margin of profit, contractual obligations, competition, or other circumstances. The remedy if needed lies not with the judiciary but with the Legislature. (*McCray v. United States*, 195 U. S. 27, 56 *et seq.*)"

Rejecting the contention that the tax was bad because it grouped transit companies having a small margin of profit and a five-cent-fare clause in their franchises with other companies not so handicapped, the Court pointed out that the local legislature might have made separate categories of each and then taxed both categories at 3%, so that the distinction sought to be made had no substance. The Court then said (R. 65-66):

"Concerned as we are primarily with substance rather than form, we see no reason for holding a tax on a certain type of utility invalid because it is imposed as part of a general tax on all utilities, when the same result could have been achieved by taxing various types of utilities under separate classifications."

The argument as to the violation of the obligation of contracts clause was rejected on the authority of *Puget Sound Power & Light Co. v. Seattle*, 291 U. S. 619 (1934). And as to the related point that its franchise protected plaintiff from the imposition of taxes under laws not envisaged at the date of the franchise, the Court said (R. 67):

"There is thus no basis whatever for reading into the above contract any express or implied obligation on the part of the city to surrender its power to tax the privilege granted to the plaintiff under laws either in existence at the time of the contract or thereafter enacted. Nor can any merit be found in the argument that the enabling acts, although general in language, must be construed as not intended to apply to transit companies because of their pre-existing contracts with the city."

The earmarking of this particular tax for unemployment relief was held no reason for invalidating it, a conclusion for which the Court found (R. 67-68) ready and ample support in *Cincinnati Soap Co. v. United States*, 301 U. S. 308, 313 (1937).

Other less serious challenges to the statute were disposed of in short order by the Court (R. 68), and need not detain us.

Summary of Argument.

Upon the record as outlined above, we propose to argue as follows:

1. The separate classification of utilities was not a denial of equal protection. Although the proceeds of the tax were earmarked for unemployment relief, the classification was not required to be based on considerations other than those sufficient to support a

general revenue tax since (1) the burdens of the tax need not be apportioned to the benefits derived; and (2) the alleged defect could be removed by separation of tax and appropriation. And in any event the possible legislative considerations amply justify the classification.

2. Uniform treatment of rapid transit companies and other utilities is not a denial of equal protection since the Fourteenth Amendment does not forbid incidental inequalities arising from uniform treatment and since the legislature would have been justified in classifying rapid transit companies separately from other utilities. (Under this same point we shall deal briefly with appellant's claim of hostile discrimination in violation of the due process clause.)
3. The imposition of the tax in question does not impair the obligation of appellant's contract with the City, since the contract contained no express or implied surrender of the power to tax.

POINT I.

The imposition of a tax at different rates upon utilities and other businesses does not violate the equal protection clause of the Fourteenth Amendment.

Appellant in its amended complaint (Paragraphs 28, 47; R. 13-14, 23) complains of the classification made by the local laws in that utilities, including appellant, are taxed at a rate equal to 3% of gross income while financial businesses pay only 1/5 of 1% and other businesses 1/10 of 1%. This attack on the local laws was held to be without substance by the State Court in this case (R. 67) and in two earlier

cases (*New York Steam Corp. v. City of New York*, 268 N. Y. 137, 147 [1935]; *Garfield v. New York Telephone Co.*, 268 N. Y. 549 [1935]), and by the Circuit Court of Appeals for the Second Circuit in *Southern Boulevard R. Co. v. City of New York*, 86 F. (2d) 633, 636 (C. C. A. 2d, 1936), certiorari denied 301 U. S. 703 (1937).

On this appeal appellant has narrowed the scope of its attack on the local laws. It concedes (Brief, pp. 26-27) that the separate classification of utilities would be valid if made for the purpose of an ordinary excise tax. It admits (Brief, p. 27) that such a classification is made in the regular tax program of the State. Appellant does not contend that the earmarking of the proceeds of the tax is in itself a defect, recognizing (Brief, p. 32) that this Court in *Cincinnati Soap Co. v. United States*, 301 U. S. 308 (1937), decided that the earmarking of the proceeds of a tax for a proper purpose does not prevent its being a true tax or make it an invalid expropriation of money from one class for the benefit of another. Finally, appellant nowhere disagrees with the finding below (R. 68) that relief of unemployment is a legitimate public purpose (see *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495, 515-518 [1937]; *New York Steam Corp. v. City of New York*, *supra*, 268 N. Y. 137, 143 [1935]).

As narrowed by appellant's concessions, well-justified by authority, the claim is that a classification valid for an ordinary tax becomes invalid when made by a statute imposing an emergency excise tax the proceeds of which are to be devoted to a specific and proper public purpose, unless a relationship can be traced between the persons included in the classification and the object to which the proceeds are to be devoted. Such a relationship, appellant contends, is lacking here. We believe that this claim is without merit.

We need not argue, as appellant (Brief, p. 33) prophesies we shall, that the decision in *Carmichael v. Southern Coal & Coke Co.*, *supra*, p. 10, 301 U. S. 495 (1937), has put an end to all requirements that classification must rest upon some real ground of difference bearing a substantial relation to the object of the legislation. We think that the requirement so expressed is, in view of appellant's concessions, not pertinent to the present consideration and is, without regard to such concessions, satisfied by the circumstances here presented.

We do not, of course, deny the doctrine that the means adopted by a legislature must have a reasonable relation to the object sought to be accomplished. Nor do we question its usual application to tax statutes that have objects other than raising revenue. (See *e. g.*, *Alaska Fish Co. v. Smith*, 255 U. S. 44 [1921], where the object was conservation of natural resources). Where justification of a classification is attempted on the ground that the statute has a purpose other than revenue, the classification may be required to be based on considerations other than those which would support a tax for revenue only. For instance, if the sole basis for the classification is the purpose of conservation, the persons to be taxed must be chosen with that end in view.

Here the statute has no such collateral object. The purpose is to raise money. The classification, therefore, need not be based on considerations beyond those which would justify a classification made by an ordinary revenue tax.

Nevertheless appellant says that the purpose here is not simply to raise money, but to raise money to meet a particular expenditure; and the classification fails, it argues, because no relationship can be traced between the taxpayers and the expenditure in question. The classification being

otherwise concededly valid and the object of the expenditure being recognizedly legitimate,* appellant's argument can be seen in its true light; it is merely that there is no sufficient relation between the taxpayer and the benefits to the public from expending the sums raised by the tax.

In spite of appellant's assertion (Brief, p. 25) that this Court has never had the opportunity to pass on the point now involved, we submit that the point is in reality one that has been frequently urged and universally rejected, for this Court has consistently refused to hold that the burdens of the taxpayer must be apportioned to the benefits derived from public expenditure. The same contention sometimes appears in another form in the suggestion that a taxpayer may resist a tax because he is not responsible for the condition to be remedied. However expressed, it has received no approval. Only recently this Court said, in *Carmichael v. Southern Coal & Coke Co.*, *supra*, p. 10 (301 U. S. at p. 521):

"Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied."

And again at page 523:

"This Court has repudiated the suggestion, whenever made, that the Constitution requires the benefits

* Appellant in citing (Brief, p. 23) *Lowry v. City of Clarksdale*, 154 Miss. 155, 122 So. 195 and similar cases (Brief, p. 25) fails to distinguish between public as against private expenditures of tax proceeds. Unlike such a group as firemen, defined by ties of occupation, origin, etc., the needy unemployed are not a definite class. They are related to each other only by a common and perhaps temporary disability which is a matter of grave public concern, and the State has historically been subjected to the duty of taking care of the needy. *New York Steam Corp. v. City of New York*, *supra*, p. 10, 268 N. Y. at p. 143; *Matter of Atlas Television Co. Inc.*, 273 N. Y. 51 (1936).

derived from the expenditure of public moneys to be apportioned to the burdens of the taxpayer, or that he can resist the payment of the tax because it is not expended for purposes which are peculiarly beneficial to him. *Cincinnati Soap Co. v. United States*, *supra*; *Carley & Hamilton v. Snook*, *supra*, 72; *Nashville C. & St. L. Ry. Co. v. Wallace*, 288 U. S. 249, 268; see *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 203."

In a footnote to that decision (p. 522), reference is made to numerous State statutes imposing taxes for specific public purposes upon classes of taxpayers who enjoy no direct benefit from the expenditure of the funds raised and who are not responsible for the condition to be remedied.

In *Magnano Co. v. Hamilton*, 292 U. S. 40 (1934), this Court in considering a tax on oleomargarine products said (p. 43):

" . . . a tax designed to be expended for a public purpose does not cease to be one levied for that purpose because it has the effect of imposing a burden upon one class of business enterprises in such a way as to benefit another class."

Pertinent also in this connection is the language of this Court in *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 203 (1905):

"But notwithstanding the rule of uniformity lying at the basis of every just system of taxation, there are doubtless many individual cases where the weight of a tax falls unequally upon the owners of the property taxed. This is almost unavoidable under every system of direct taxation. But the tax is not rendered illegal by such discrimination. Thus every citizen is bound to pay his proportion of a school tax, though he have no children; of a police tax, though he have no buildings or personal prop-

erty to be guarded; or of a road tax, though he never use the road. In other words, a general tax cannot be dissected to show that, as to certain constituent parts, the taxpayer receives no benefit. Even in case of special assessments imposed for the improvement of property within certain limits, the fact that it is extremely doubtful whether a particular lot can receive any benefit from the improvement does not invalidate the tax with respect to such lot."

On a different ground we think appellant's claim is unjustifiable. By insisting (*e. g.*, Brief, p. 25) that a different standard of classification is required for the present tax to raise money for a specified purpose than for a general revenue statute, appellant disregards substance and exalts form. For as appellant realizes (Brief, pp. 30-31) the tax here in question could be cured of the alleged vice by a formal separation of tax and appropriation. Appellant's attempted answer that under the Enabling Acts the City had no authority to make this separation is insufficient, for we are concerned here ultimately with the power of the State, which the City exercises as its agent under proper delegation. That the State could make the formal correction and remove the claimed defect is, we think, implicit in the decision in *Cincinnati Soap Co. v. United States*, *supra*, p. 10, 301 U. S., at p. 323. Any disparity between the City's power in the premises, and the State's, is a question of State law not open on this appeal.

But even viewing the exaction at bar as one linked to the specific purpose of unemployment relief, the State Court* and the Circuit Court of Appeals† were thoroughly justified in finding that the classification was appropriate for the purpose in question. Utilities have historically been

* *New York Steam Corp. v. City of New York*, *supra*, p. 10.

† *Southern Boulevard R. Co. v. City of New York*, *supra*, p. 10.

subjected to special legislative treatment. They have received advantages over other businesses. They are afforded a degree of protection against competition which, if not absolute in some cases, constitutes at least an immense advantage over the position of other businesses, ever exposed to unlimited private competition. Some, including appellant here, have been assisted by municipal investment of enormous sums in their enterprises * or by grants of rights of way and other privileges. Convenience of administration, due to the supervision of the Department of Public Service, although perhaps not sufficient in itself to justify gross inequality (see *Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550, 560 [1935]), is an added factor which may be given some weight. *Carmichael v. Southern Coal & Coke Co.*, *supra*, p. 10, 301 U. S. at p. 520.

And there are other differences, more intimately related to the evil sought to be cured by the local laws. Utilities by franchise or otherwise are given the right, usually exclusive to some extent, to cater to the most vital needs of the community. They are allowed to furnish for profit services which everyone must buy, particularly in a social organism as extensive and complex as the City of New York. We may take it as established, therefore, that utilities, by reason of the urgency and indispensability of the services they are engaged in furnishing, exhibit, in times of depression, comparatively great stability and comparatively slow response to the general evils of unemployment. This being so, the Legislature made a rational, and hence constitutional,

* See Contract No. 4, pp. 20-27 (printing dispensed with by order [R. 82]). The Railroad was to be constructed by the City (Art. IX-X, p. 20) at its own cost less a contribution of \$13,500,000 by the Lessee (Art. XI, p. 21). The City was also to acquire necessary real estate (Art. XIV, p. 26). The Lessee was to reconstruct existing lines (Art. XIII, p. 24) and to pay the cost of the Canal Street connection (Art. XI, p. 24).

classification for tax purposes when they imposed upon utilities what may in practice work out to be a comparatively heavy tax burden.

The above considerations supply ample justification for the statement in the *Southern Boulevard* case, *supra*, p. 10, 86 F. [2d], at p. 636, that,

"The character of the utility business contains elements of difference which the Legislature is not bound to ignore and which it can use as a basis for reasonable discrimination. See *Atlantic Coast Line R. Co. v. Daughton*, 262 U. S. 413, 43 S. Ct. 620, 67 L. Ed. 1051; *Honolulu R. T. Co. v. Wilder*, 36 F. (2d) 159 (C. C. A. 9)."

We may refer also to the statement of the rule given in *Metropolitan Casualty Co. v. Brownell*, 294 U. S. 580 (1935) at page 584:

"It is a salutary principle of judicial decision, long emphasized and followed by this Court, that the burden of establishing the unconstitutionality of a statute rests on him who assails it, and that courts may not declare a legislative discrimination invalid unless, viewed in the light of facts made known or generally assumed, it is of such a character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators. A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it. *Rast v. VanDeman & Lewis Co.*, 240 U. S. 342, 357; *Tax Commissioners v. Jackson*, 283 U. S. 527, 537."

Finally, the argument that the tax upon the class to which the plaintiff belongs is 3000% higher than the tax imposed on persons or corporations engaged in purely mer-

cantile pursuits (3% as compared with 1/10 of 1%), does not make out a case of unfair discrimination, for the legislature is not compelled to tax every business as a condition of asserting the right to tax any. And when a group (*e. g.*, lawyers and doctors) is left untaxed, the tax on utilities is as to that group higher by infinity percent. The argument thus fails to stand up under scrutiny, and it was made and rejected in the *Southern Boulevard* case, *supra*, p. 10.

POINT II.

The imposition of a tax equal to 3% of gross income upon a class embracing both rapid transit companies and other utilities—groups which may exhibit different ratios of gross to net income—does not violate the Fourteenth Amendment of the Federal Constitution.

Appellant further complains that by classifying, under a fixed-rate tax measured by gross income, corporations having relatively small margins of profit with those having relatively large margins of profit, an unconstitutional inequality has been achieved. In this connection, appellant refers in its amended complaint (Paragraph 47, subd. 3 [e]; R. 25) to its inability to charge more than a five-cent fare, but lays greater stress (Paragraphs 40-41, 47, subd. 3 [b]; R. 18-19, 25) on what it alleges to be a business difference between transit corporations on the one hand and power, heat and light corporations on the other hand, namely, higher operating expenses and lower margins of profit. Because of these distinguishing factors, it is contended, the burden of the tax is unequally distributed and appellant is "denied the equal protection of the law."

It will be seen that this argument is a distortion of the usual claim under the equal protection clause. Generally, attack is made upon an unequal legislative treatment of persons similarly situated. Here, the alleged defect is the equal treatment of diverse types of business. Equality of treatment is said to deny equal protection, uniformity to be discrimination.

(1)

It may be answered, first, that appellant mistakes the scope of the equal protection clause. We submit that, given an enactment which may reasonably be called a tax, uniformly applied by the Legislature at a fixed rate to all persons within a properly chosen class, there is no constitutional prohibition of incidental inequalities of burden.

To some extent, at least, any tax measured by gross income must necessarily impose burdens which vary with the nature of the taxpayer's business. High margins of profit will mean that the burden of the tax is light. A good business will find it easier to pay the tax than a poor business. Yet gross income taxes have been sustained by this Court. *Puget Sound Power & Light Co. v. Seattle*, 291 U. S. 619 (1934); *Southwestern Oil Co. v. Texas*, 217 U. S. 114 (1910). Moreover, this Court has on several occasions refused to approve a contention that incidental inequalities arising from uniform treatment are a denial of equal protection. *Ohio Oil Co. v. Conway*, 281 U. S. 146, 163 (1930); *Exchange Drug Co. v. Long*, 281 U. S. 693 (1930); and see *Metropolis Theatre Co. v. Chicago*, 228 U. S. 61 (1913). Poll taxes and retail sales taxes which must be passed on to the consumer are examples of familiar exactions the incidence of which varies with the circumstances of the taxpayer.

The tax in the present case is exacted from appellant for the privilege of exercising its franchise, holding property and doing business in the City of New York (R. 33, 44). The amount of gross income has an obvious relation to this subject, being a means of expressing the amount of business done and of measuring the extent of the exercise of the franchise. In choosing the measure of this tax the local legislature has reasonably selected an index, namely, "volume", recognized as significant by business men and frequently referred to in the commercial world in forming judgments upon business enterprises.

We have here, then, a tax upon a proper subject and with a reasonable measure, applied at a uniform rate to all within a class which may concededly receive separate treatment for the purposes of general taxation. In asserting that because of the peculiarities of its business the uniform rate imposed on it and other utilities is discriminatory, appellant in effect insists that the Municipal Assembly was constitutionally required to relieve it from the burdens (if such they have turned out to be) of its own contract and from a disability, namely, the need of relatively large working capital, inherent in the nature of its business. We believe this claim to be without merit.

The contention that this tax is discriminatory as applied to a corporation limited to a five-cent fare was expressly rejected in *Southern Boulevard R. Co. v. City of New York*, *supra*, p. 10, 86 F. (2d) 633 (C. C. A. 2d, 1936). The Court there said (at p. 637):

"The inability of the appellant to shift the tax to the public because of the 5-cent fare, compelled by its franchise, does not render the tax unconstitutional. That is a hardship caused by its contract which, as we have said, did not curtail the taxing power."

We may add that so much of appellant's argument as is based upon differences in margins of profit was also made, in substance if not in form, in the *Southern Boulevard* case. After the opinion of the Special Term of the Supreme Court in the case at bar had been published (97 New York Law Journal 241), the attorney for the Southern Boulevard Railroad Company asked the Circuit Court of Appeals for leave to amend its complaint by adding a paragraph comparable to paragraph "40" of the complaint at bar. The Corporation Counsel pointed out that the Southern Boulevard Railroad Company's complaint already contained the substance of such a paragraph (see fols. 57-58 of the *Southern Boulevard* record); and the motion was denied (97 New York Law Journal 1379).

The point was again featured in the *Southern Boulevard* petition for certiorari, 301 U. S. 703 (1937).

We submit that the Municipal Assembly, in taxing all within the class at a uniform rate, has fulfilled the constitutional requirement of equal protection. As a legislature, the Municipal Assembly might properly have considered the extent to which individual taxpayers might be differently affected due to characteristic peculiarities of their businesses or to the effects of their own contracts; but the Constitution does not demand such consideration. It is inequality of treatment, not incidental inequality of burden, that is condemned by the Fourteenth Amendment. The legislative duty with respect to equality, as stated by this Court in *Kentucky Railroad Tax Cases*, 115 U. S. 321, 337 (1885), " . . . only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances." The significance of the words "upon all persons in similar circumstances" is illustrated in the recent case of *Fox v. Standard*

Oil Co. of N. J., 294 U. S. 87 (1935), where a chain store tax graduated in rate according to the number of retail outlets was held constitutional as applied to a chain of gasoline filling stations. The Court rejected the argument that the business difference between gasoline chains and other chains needing fewer outlets resulted in a discrimination. The Court said in this connection (p. 102):

"We have never yet held that government in levying a graduated tax upon all the members of a class must satisfy itself by inquiry that every group within the class will be able to pay the tax without the sacrifice of profits. The operation of a general rule will seldom be the same for every one. If the accidents of trade lead to inequality or hardship, the consequences must be accepted as inherent in government by law instead of government by edict."

And more recently, in upholding the Louisiana chain store tax, this Court said in *Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U. S. 412 (1937), at page 424:

"We cannot say that classification of chains according to the number of units must be condemned because another method more nicely adjusted to represent the differences in earning power of the individual stores might have been chosen, for the legislature is not required to make meticulous adjustments in an effort to avoid incidental hardships. . . . The statute bears equally upon all who fall into the same class, and this satisfies the guaranty of equal protection."

It would indeed be setting up an impossible standard if the Legislature, laboring under pressure to meet an emergency, were required to give heed and effect to the adventitious circumstance that operating and maintenance expenses of rapid transit railroads are higher in proportion to gross

receipts than those of other utilities falling under the local law in question.

Appellant has placed reliance on the case of *Stewart Dry Goods Co. v. Lewis, supra*, p. 15, 294 U. S. 550 (1935), in which a gross receipts tax with rates graduated with respect to volume of sales (as contrasted with the fixed-rate tax at bar) was invalidated. The opinions make it evident that the vice of the statute was the sliding scale of rates. What was there condemned was the unjustified inequality of legislative treatment, not an incidental inequality of burden resulting from uniform treatment. That the Court was not condemning a fixed-rate tax is apparent from the following language used at page 563:

"The record fails to show that an income tax or a flat tax on sales would not accomplish the desired end. The adoption of laws of the latter description by many of the states is a practical confirmation of the view that they are effective measures."

Appellant's arguments (Brief, p. 47) based on different ratios of gross to net income are in substance a condemnation of all gross receipts taxes. The underlying assumption made by appellant is that these different ratios are not mere accidents of trade, but are the results of essential differences in character between street railroad companies and other utilities. But, on appellant's own statement, this basic assumption is subject to so many qualifications that it loses all value. Appellant's ratio of net to gross income is said to be 19%, that of Brooklyn and Queens Transit Corporation (the appellant in case No. 436) 14½%, while other street railroad corporations for the same period had no net income and suffered a net loss (Brief, p. 47). Thus it appears clear that, to a very large extent at least, differing margins of profit are due to "accidents of trade" such

as efficiency of management, nature of business territory, and the like, rather than to inherent differences between different types of business.

If the legislature were under a constitutional duty to take into consideration the difference in margins of profit between street railroad companies and gas companies, for example, there would be equally strong arguments to show that it should also take into consideration the immeasurable difference between a street railroad company earning 19% of its gross income and a street railroad company having a net loss.* This would impose upon the legislature an inconceivably difficult task of individual adjustment.

The same may be said of appellant's complaint that it is subject to municipal competition. A gross receipts tax has been held not to constitute a denial of equal protection in spite of such competition. *Puget Sound Power & Light Co. v. Seattle*, 291 U. S. 619 (1934) *supra*, p. 18. And in any event, the amount of competition, like the ratio between gross and net income, is a factor varying with individual businesses. Here again, to require the legislature to make adjustments to the varying degrees of competition would be to impose an impossible standard.

(2)

But there is a second and distinct answer to the argument made by appellant, an answer which was adopted by the Court below (R. 65). In the instant case the Municipal Assembly has taken as the unit for classification purposes a larger unit than it needed to take. It has taken as the

* The hardship which the local law might cause to a particular utility so circumstanced is not one on which this appellant may rely to defeat the law. *Blackmer v. United States*, 284 U. S. 421, 442 (1932).

unit utilities subject to the Transit Commission or the Public Service Commission.

The result is that rapid transit lines find themselves bedfellows of electric, gas and power plants.

The Municipal Assembly could have gone through the idle ceremony of breaking the commission-controlled group into two groups, and called them: No. 1: rapid transit lines; No. 2: electric light, gas and power plants. And it could have fixed the tax on each at the same rate, *i. e.*, 3% of the gross receipts. Nor could the separate treatment of railroad companies have been successfully challenged, there being no claim that the tax does not affect all transit companies equally. *Southern Railway Co. v. Watts*, 260 U. S. 519, 530 (1923).

If transit lines had been separately classified, the comparison (Complaint, paragraph 40, R. 18) between the appellant and the Brooklyn Edison Company would have been obviously irrelevant. It does not gain relevance by the action of the Municipal Assembly in making a coarser rather than a more minute and refined classification. On this point the Court below said (R. 65):

"Concerned as we are primarily with substance rather than form, we see no reason for holding a tax on a certain type of utility invalid because it is imposed as part of a general tax on all utilities, when the same result could have been achieved by taxing various types of utilities under separate classifications."

(3)

What has been said above is a sufficient answer to appellant's contention (R. 22; Brief, p. 35) that the classification of rapid transit companies with other utilities constitutes an arbitrary and hostile discrimination against appellant

and other street railroads in violation of the due process clause. We are not here attempting to justify "spoliation under the guise of exercising the power to tax" (*Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 615 [1899]). To the local laws at bar, framed as temporary measures to meet an emergency created by a great public need, there clings not the slightest taint of spoliation or other censurable motive. The street railroads have not been singled out for special treatment; they have been included with other utilities under a classification admittedly used by the State in its normal tax program and not challenged as used for that purpose. The tax affects all street railroads, those happening to have contracts with the City like Contract No. 4, and those not having such contracts (*e. g.*, Brooklyn and Queens Transit Corporation, appellant in Case No. 436), the latter condition presumably being the usual one.

Nor was the tax here imposed on utilities the sole measure adopted to raise the needed funds. Recourse was also had (R. 13) to a 2% general retail sales tax, a 2% tax on certain articles of personal property and a short-lived estate tax, as well as to the tax on financial and other businesses referred to above at p. 9. The enactment of these various measures, among which the tax at bar was included as part of a general scheme, shows an attempt to distribute among all classes the burden of unemployment relief, refuting appellant's charges that no thought was given to such considerations.

Judged as they must be, even on a demurrer, by their contents and not by the characterizations in the complaint (*Alaska Fish Co. v. Smith, supra*, p. 11, 225 U. S. 44, 49, 1921), the local laws disclose no trace of hostility.

Finally, with reference to appellant's allegations of oppressiveness, we may refer to the well-established doctrine of this Court that when the power to tax exists the extent

of the burden is a matter for the discretion of the law-makers. As was said in *Magnano Co. v. Hamilton*, *supra*, p. 13, 292 U. S., at p. 47, upholding an oleomargarine tax,

"If a contrary conclusion were reached in the present case, it could rest upon nothing more than the single premise that the amount of the tax is so excessive that it will bring about the destruction of appellant's business, a premise which, standing alone, this court heretofore has uniformly rejected as furnishing no juridical ground for striking down a taxing act."

Those who enter upon a business take the risk of hardship arising from taxation. *Alaska Fish Co. v. Smith*, *supra*, p. 11, 255 U. S., at p. 48; *Fox v. Standard Oil Co.*, *supra*, p. 20, 294 U. S., at p. 99. Here we may invoke (*mutatis mutandis*) the familiar principle of *Powell v. Pennsylvania*, 127 U. S. 678 (1888) that (p. 686)

"If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine, as an article of food, their appeal must be to the legislature, or to the ballot box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government."

POINT III.

The Local Laws do not violate the obligation of contracts clause of the Federal Constitution.

As its final ground of attack, appellant in its amended complaint (Paragraphs 43-47; R. 22) seeks to make out a case of unconstitutional impairment of the obligation of its contract with the City. The contention now made (Brief, p. 61) is primarily that the imposition of the tax is a violation of the City's *express* covenants.

In so arguing appellant attacks the construction given to the contract by the Court below (R. 66-67). This Court has, we agree, the power to reject the construction below and to determine the meaning of the contract independently, but its usual practice is to "lean toward agreement with the courts of the state, and accept their judgment as to such matters unless manifestly wrong". *Hale v. Board of Assessment and Review*, 302 U. S. 95, 101 (1937). In the present case the result reached by the State Court was amply justified.

It is not necessary here to discuss whether the Court of Appeals determined that the imposition of the tax at bar was expressly allowed by the contract or merely that it was not expressly or impliedly forbidden. Either construction, if sustained, disposes of the present contention.

That the Court of Appeals had in mind the argument that the contract expressly prohibited the imposition of this tax may be demonstrated (if that be necessary) from its opinion. The Court (R. 66) distinguished the case of *Brooklyn Bus Corp. v. City of New York*, 274 N. Y. 140 (1937), on the ground that the contract there expressly provided that any new form of tax upon the franchise should be deducted from the payments to the City. In contrast, the Court pointed (R. 67) to the provision (subd. 2 of Art. XLIX, p. 60) of appellant's contract (Contract No. 4) under which there are to be deducted from gross receipts, prior to any stipulated payments either to appellant or the City,

"2. Taxes, if any, upon property actually and necessarily used by the Lessee in the operation of the Railroad and the Existing Railroads, together with all taxes or other governmental charges of every description (whether on physical property, stock or securities, corporate or other franchises, or otherwise) assessed or which may hereafter be assessed against the Lessee in connection with or incident to

the operation of the Railroad and the Existing Railroads. Also such assessments for benefits as are not property chargeable to cost of construction or cost of equipment."

Referring to this inclusive definition, the Court said (R. 67):

"There is thus no basis whatever for reading into the above contract any express or implied obligation on the part of the city to surrender its power to tax the privilege granted to the plaintiff under laws either in existence at the time of the contract or thereafter enacted."

In view of the broad language of the contract itself, by which the imposition of taxes "which may hereafter be assessed" is not only *impliedly*, but even *expressly* provided for, we submit that this construction cannot be considered "manifestly wrong".

Appellant's arguments come to no more than that it is unlikely that a provision such as Art. XLIX, subd. 2, should have been inserted in Contract No. 4; these arguments are ineffective in the face of the fact that such a provision *was* inserted. Again appellant is in substance asking this Court to relieve it of the effect of its own contract.

In effect appellant charges that the City, by the imposition of this tax, is merely attempting to vary the disposition of gross income under Contract No. 4 and to receive a return on its investment which it has not earned under that contract. To this charge, there is a sufficient answer. The money collected by this tax does not go to the City. It may not be placed in the general funds and be used for City purposes. Both the Enabling Acts and the Local Laws so ordain. It must be used for a State purpose, unemployment relief. Appellant fails to distinguish between the City as

party to Contract No. 4 and the City as agent of the State collecting money for a State purpose.

In any event, the case of *Puget Sound Power & Light Co. v. Seattle*, 291 U. S. 619 (1934), *supra*, p. 18, relied on by the Court below (R. 66), is ample authority for its decision. The tax imposed by an ordinance of the defendant city in that case was equal to 3% of the gross income from business in the city during the preceding year. It was assailed on the ground, among others, that "by imposing a license tax upon the privilege of doing the business, the ordinance impairs appellant's franchise contract which gave it the right to conduct the business" (p. 622). The Supreme Court upheld the ordinance and, in rejecting the above contention, said (p. 627):

"Appellant asserts a contract under its franchise to use the streets of the city for the purpose of carrying on its business for an unexpired term of years. It argues that the franchise is a contract license to carry on the business, and that the exaction of a tax as a condition precedent to the enjoyment of the license will operate to destroy the privilege granted by the franchise. This argument was made and answered in *Memphis Gas Co. v. Shelby County*, 109 U. S. 398, and in *St. Louis v. United Railways Co.*, 210 U. S. 266. Surrender of the state's power to tax the privilege is not to be implied from the grant of it. Hence, appellant took its franchise subject to the power of the state to tax the granted privilege in common with all other privileges and property in the state. Without a clearly expressed obligation on the part of the city to surrender that power the contract clause does not limit it."

The foregoing case was cited, and its principles applied to the tax here in question, in the *Southern Boulevard case*, 86 F. (2d) 633 (C. C. A., 2nd, 1936), cert. den. 301 U. S. 703 (1937), *supra*, p. 10. There the Court, in affirming an

order granting the City's motion to dismiss the complaint, said (p. 635):

"Appellant argues that its contract with the City has been impaired, that, by its franchise, it was obliged to pay 5 per cent. of its gross receipts, and that the disputed excise tax of 3 per cent. is an indirect way of altering the terms of its franchise. But the City did not, in granting the franchise, abdicate its power of taxation, and such abdication cannot be implied from the grant of a privilege on specified terms. *Puget Sound Co. v. Seattle*, 291 U. S. 619, 54 S. Ct. 542, 78 L. Ed. 1025; *St. Louis v. United Rys. Co.*, 210 U. S. 266, 28 S. Ct. 630, 52 L. Ed. 1054; *New Orleans City Ry. Co. v. New Orleans*, 143 U. S. 192, 12 S. Ct. 406, 36 L. Ed. 121. It is immaterial that the tax in question is said to be for the 'privilege of exercising the franchise' or that both under the franchise and disputed tax gross income is taken as the measure."

Conclusion.

The judgment appealed from should be affirmed, with costs.

Dated, New York, N. Y., February 2, 1938.

Respectfully submitted,

WILLIAM C. CHANLER,

*Corporation Counsel of the City
of New York,*

Attorney for Appellee.

PAXTON BLAIR,

OSCAR S. COY,

DAVIDSON SOMMERS,

SOL CHARLES LEVINE,

of Counsel.

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 436

**BROOKLYN AND QUEENS TRANSIT CORPORATION,
APPELLANT,**

vs.

THE CITY OF NEW YORK

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK

FILED SEPTEMBER 12 1937

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 436

BROOKLYN AND QUEENS TRANSIT CORPORATION,
APPELLANT,

vs.

THE CITY OF NEW YORK

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK

INDEX.

	Original	Print
Record on appeal to Court of Appeals of New York.....	1	1
Statement under Rule 234.....	1	1
Notice of appeal to the Appellate Division.....	2	1
Order appealed from	3	2
Notice of motion to dismiss the complaint.....	4	2
Amended complaint	5	3
Exhibit "A"—Chapter 873 of the Laws of the State of New York of 1934.....	34	23
Exhibit "B"—Chapter 601 of the Laws of the State of New York of 1935.....	37	25
Exhibit "C"—Local Law No. 21, of 1934 as amended by Local Law No. 2 of 1935.....	41	27
Exhibit "D"—Local Law No. 30 of 1935.....	55	37
Stipulation as to exhibits not printed.....	60	47
Opinion of Steuer, J.....	70	48
Waiver of certification.....	76	52
Notice of appeal to the Court of Appeals.....	77	53
Order granting leave to appeal to the Court of Appeals.	79	53
Order of affirmance—Appellate Division.....	80	54
Affidavit of no opinion by Appellate Division.....	81	55

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 8, 1937.

Record on appeal to Court of Appeals of New York—Continued.

	Original	Print
Waiver of certification.....	82	55
Remittitur of Court of Appeals.....	83	55
Order of Appellate Division on remittitur.....	86	57
Judgment of Supreme Court on remittitur.....	87-a	58
Order resettling judgment.....	88	60
Order allowing appeal.....	91	62
Petition for appeal.....	93	63
Assignments of error.....	99	67
Citation and service..... (omitted in printing) ..	104	
Bond on appeal..... (omitted in printing) ..	105	
Stipulation as to transcript of record	110	71
Clerk's certificate..... (omitted in printing) ..	112	
Statement of points to be relied upon and designation as to printing record	113	72

[fol. 1]

**IN SUPREME COURT OF NEW YORK, APPELLATE
DIVISION, FIRST DEPARTMENT**

**BROOKLYN AND QUEENS TRANSIT CORPORATION, Plaintiff-
Respondent,
against**

THE CITY OF NEW YORK, Defendant-Appellant

STATEMENT UNDER RULE 234

This action was commenced by the service of the summons on defendant on or about September 23, 1936. On October 9, 1936, plaintiff served an amended complaint.

Defendant on October 29, 1936, served a notice of motion to dismiss the complaint and direct judgment for defendant for failure to state a cause of action. Defendant appeals from the order denying said motion.

Plaintiff appeared by George D. Yeomans and defendant appeared by Paul Windels, Corporation Counsel.

There has been no change of parties or of attorneys herein.

[fol. 2] **IN SUPREME COURT OF NEW YORK, NEW YORK
COUNTY**

[Title omitted]

NOTICE OF APPEAL TO THE APPELLATE DIVISION

SIRS:

Please take notice that the defendant hereby appeals to the Appellate Division of the Supreme Court, First Department, from the order entered herein in the office of the Clerk of the County of New York on or about the 15th day of January, 1937, denying defendant's motion to dismiss the complaint herein, and the defendant appeals from each and every part of said order as well as from the whole thereof.

Dated, February 11, 1937.

Yours, etc., Paul Windels, Corporation Counsel, Attorney for Defendant, Office and Post Office Address, Municipal Building, Borough of Manhattan, New York City.

[fol. 3] To George D. Yeomans, Esq., Attorney for Plaintiff, 385 Flatbush Avenue Extension, Borough of Brooklyn, New York City. Hon. Albert Marinelli, Clerk of New York County.

IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK,
SPECIAL TERM, PART III

Index Number 27746—Year 1936

BROOKLYN & QUEENS TRANSIT CORP.

against

THE CITY OF NEW YORK

Present: Hon. Aron Steuer, Justice

ORDER APPEALED FROM

The following papers numbered 1 to 4 read on this motion, Argued—Dec. Res.—this 6th day of Jan., 1937. Motion Calendar No. 782.

Notice of Motion and Annexed Complaint	Papers Numbered
& Cont. #4.....	1-3

[fol. 4] Upon the foregoing papers this motion is disposed of similarly to the motion — New York Rapid Transit Corp. vs. The City of New York decided herewith.

Dated, January 14th, 1937.

Enter.

A. S., J. S. C.

Brief in Opposition—A.

IN SUPREME COURT OF NEW YORK, NEW YORK COUNTY

[Same title]

NOTICE OF MOTION TO DISMISS COMPLAINT

Please take notice that upon the summons and complaint herein, duly verified on the 9th day of October, 1936, and all the proceedings herein, a motion will be made at Special Term, Part III of this court, at the Court House thereof, Foley Square, Borough of Manhattan, City of New York,

on the 10th day of November, 1936, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order dismissing the complaint herein and directing judgment for the defendant, on the grounds that the complaint does not set forth facts sufficient to state a cause of action and that the Court has no jurisdiction of [fol. 5] this action, and for such other and further relief as to this Court may seem just and proper.

Dated, New York, October 29, 1936.

Yours, etc., Paul Windels, Corporation Counsel, Attorney for Defendant, Office & P. O. Address, Municipal Building, Borough of Manhattan, City of New York.

To George D. Yeomans, Esq., Attorney for Plaintiff, 385 Flatbush Avenue Extension, Borough of Brooklyn, City of New York.

IN SUPREME COURT OF NEW YORK, NEW YORK COUNTY

[Same title]

AMENDED COMPLAINT

The plaintiff, complaining of the defendant, by George D. Yeomans, its attorney, alleges, upon information and belief,

First. The plaintiff is a street railway corporation organized and existing under the laws of the State of New York [fol. 6] and having its principal office at No. 385 Flatbush Avenue Extension, Borough of Brooklyn, City and State of New York.

Second. Defendant is and at all times hereinafter mentioned was a Municipal Corporation organized and existing under the laws of the State of New York, being the only city in the State of New York having a population of a million inhabitants or more.

Third. Plaintiff is and at all times hereinafter mentioned was a common carrier lawfully engaged in the operation of a system of street surface railroads in the City of New York. By reason of the operation of said street railroads the plaintiff is and at all the times hereinafter mentioned was under the supervision of the Transit Commission which

is the Metropolitan Division of the Department of Public Service.

Fourth. In August, 1934, the Legislature of the State of New York passed a bill which, with the approval of the Governor, became a law on August 18, 1934, known as Chapter 873 of the Laws of 1934, and a copy thereof, marked Exhibit A, is hereto annexed and made a part hereof.

Fifth. In April, 1935, the Legislature of the State of New York passed a bill which, with the approval of the Governor, became a law on April 29, 1935, known as Chapter 601 of the Laws of 1935, and a copy thereof, marked Exhibit B, is hereto annexed and made a part hereof.

[fol. 7] Sixth. The Municipal Assembly of the City of New York, acting under the alleged authority of said Chapter 873 of the Laws of 1934, passed a bill which, with the approval of the Mayor, on or about December 5, 1934, became Local Law No. 21 of the City of New York for the year 1934.

Seventh. The Municipal Assembly of the City of New York, acting under the alleged authority of said Chapter 873 of the Laws of 1934, passed a bill which, with the approval of the Mayor, on or about February 27, 1935, became Local Law No. 2 of the City of New York for the year 1935, which said Local Law No. 2 of 1935 amended said Local Law No. 21 of 1934. Annexed hereto, marked Exhibit "C" and hereby made a part of this complaint is a copy of said Local Law No. 21 of 1934, as amended by said Local Law No. 2 of 1935, the words appearing in said copy in brackets being words originally contained in said Local Law No. 21 of 1934 which were stricken out by Local Law No. 2 of 1935, and the words in italics being new words added by said Local Law No. 2 of 1935 to the original language of said Local Law No. 21 of 1934.

Eighth. The Municipal Assembly of the City of New York, acting under the alleged authority of said Chapter 873 of the Laws of 1934, as amended by said Chapter 601 of the Laws of 1935, passed a bill which, with the approval of the Mayor, on or about December 4, 1935, became Local Law No. 30 of the City of New York for the year 1935, and a copy of said Local Law No. 30 of 1935, marked Exhibit D is hereto annexed and made a part hereof.

[fol. 8] Ninth. Said Local Law No. 21 for the year 1934, both in its original form and as amended by said Local Law

No. 2 for the year 1935, purports to impose upon every utility (as therein defined) doing business in the City of New York and subject to the supervision of either Division of the Department of Public Service, an excise tax for the privilege of exercising its franchise or franchises or of holding property, or of doing business in the City of New York during the calendar year 1935, or any part thereof, equal to three per centum of its "Gross Income" for the calendar year 1935, and purports to impose an excise tax on every utility (as therein defined) doing business in the City of New York, but not subject to the supervision of either Division of the Department of Public Service, for the privilege of exercising its franchise or franchises, or of holding property, or of doing business in the City of New York, equal to three per centum of its "Gross Operating Income" for the calendar year 1935, each utility, as therein defined, being required by the terms of said Local Law to file with the Comptroller of the City of New York each month, commencing with the month of February, 1935, and ending with the month of January, 1936, a return showing its gross income, or gross operating income, as the case might be, for the preceding calendar month and to pay to the said Comptroller of the City of New York at the time of filing each return such portion of the tax purported to be imposed by said Local Law as should be equal to three per centum of its gross income, or gross operating income, as the case might be, for the period covered by such return.

[fol. 9]. Tenth. Said Local Law No. 30 of the City of New York for the year 1935 purports to impose upon every utility (as therein defined) doing business in the City of New York and subject to either Division of the Department of Public Service, an excise tax for the privilege of exercising its franchise or franchises, or of holding property, or of doing business in the City of New York from January 1, 1936, to June 30, 1936, or any part of such period, equal to three per centum of its "Gross Income" for the said period, and purports to impose upon every utility (as therein defined) doing business in the City of New York, but not subject to the supervision of either Division of the Department of Public Service, an excise tax for the privilege of exercising its franchise or franchises, or of holding property, or of doing business in the City of New York, equal to three per centum of its "Gross Operating Income" for the said period.

from January 1, 1936, to June 30, 1936, each utility being required, by the terms of said Local Law, to file with the Comptroller of the City of New York each month, commencing with the month of February, 1936, and ending with the month of July, 1936, a return showing its gross income, or gross operating income, as the case might be, for the preceding calendar month and to pay to the said Comptroller of the City of New York at the time of filing each return such portion of the tax, purported to be imposed by said Local Law as should be equal to three per centum of its gross income, or gross operating income, as the case might be, for the period covered by such return.

Eleventh. Both said Local Law No. 21 of 1934, as amended, [fol. 10] and said Local Law No. 30 of 1935, contain provisions defining the word "Utility" as therein used as meaning "any person subject to the supervision of either Division of the Department of Public Service and every person, whether or not such person is subject to such supervision, who shall engage in the business of furnishing or selling to other persons gas, electricity, steam, water, refrigeration, telephony and/or telegraphy, or who shall engage in the business of furnishing or selling to other persons gas, electric, steam, water, refrigeration, telephone or telegraph service." Both of said laws define the word "person" to include corporations and define the words "Gross Income" as therein used as meaning and including "receipts received in or by reason of any sale made (except sale of real property) or service rendered in the City of New York, including cash, credits and property of any kind or nature (whether or not such sale is made or such service is rendered for profit) without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or services or other costs, interest, or discount paid, or any other expense whatsoever; also profits from the sale of real property growing out of the ownership or use of or interest in such property; also profit from the sale of personal property (other than property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the period for which a return is made); also receipts from interest, dividends and royalties, without any deductions therefrom for any expenses whatsoever incurred in connection with the receipt thereof, and also gains or profits [fol. 11] from any source whatsoever." Both of said laws

define the words "Gross Operating Income" to mean "receipts received in or by reason of any sale made or service rendered, of the property and services" specified in the definition of the word "utility" above referred to, "in the City of New York, including cash, credits and property of any kind or nature, without any deduction therefrom on account of the cost of the property sold; the cost of materials used, labor or services, or other costs, interest or discount paid, or any other expenses whatsoever."

Twelfth. The acts of the legislature of the State of New York known as Chapter 873 of the Laws of 1934 and Chapter 601 of the Laws of 1935, under the alleged authority of which the said Municipal Assembly of the City of New York adopted said Local Laws No. 21 of 1934, No. 2 of 1935 and No. 30 of 1935, purport to authorize any city of the State of New York having a population of one million inhabitants or more, acting through its local legislative body, to adopt and amend local laws imposing any tax or taxes which the state legislature has or would have power and authority to impose, to relieve the people of any such city from the hardships and suffering caused by unemployment, provided that any tax imposed thereunder shall have application only within the territorial limits of such city and shall be in addition to any and all other taxes.

Thirteenth. Said Chapter 873 of the Laws of 1934 and said Chapter 601 of the Laws of 1935 both provide in substance that revenues resulting from the imposition of taxes authorized by said Acts shall not be credited or deposited in [fol. 12] the general fund of the City, but shall be deposited in a separate bank account or accounts and shall be available and used solely and exclusively for the relief purposes for which said Acts authorize the imposition of such taxes.

Fourteenth. Said Local Law No. 21 of 1934, as amended, and said Local Law No. 30 of 1935, each provides as follows:

"All revenues and moneys resulting from the imposition of the taxes imposed by this local law shall be paid into the treasury of the City of New York and shall not be credited or deposited in the general fund of the City of New York but shall be deposited in a separate bank account or accounts, and shall be available and used solely and exclusively for the purpose of relieving the people of the City of New

York from the hardships and suffering caused by unemployment, including the repayment of moneys borrowed for such purpose."

Fifteenth. The said Local Law No. 21 of 1934, as amended by said Local Law No. 2 of 1935, and the said Local Law No. 30 of 1935, each provides for the enforcement and collection from utilities (as therein defined) of penalties for any failure to make a return or pay a tax under the provisions of and within the time required by said law, which penalties are fixed at 5% of the amount of the tax required to be paid by the terms of said law, plus 1 per centum of such tax for each month of delay or fraction thereof excepting the first month after such return was required by the law to be filed or the tax to be paid.

[fol. 13] Sixteenth. On the respective dates below specified the plaintiff, under protest and in order to avoid the threat of penalties, filed with the Comptroller of the City of New York return of its gross income for the respective months herein below specified:

Date of Filing Returns	Period Covered by Returns
February 28, 1935	Month of January, 1935.
March 25, 1935	" February, 1935.
April 25, 1935	" March, 1935.
May 25, 1935	" April, 1935.
June 25, 1935	" May, 1935.
July 25, 1935	" June, 1935.
August 24, 1935	" July, 1935.
September 25, 1935	" August, 1935.
October 25, 1935	" September, 1935.
November 25, 1935	" October, 1935.
December 24, 1935	" November, 1935.
January 25, 1936	" December, 1935.
February 25, 1936	" January, 1936.
March 25, 1936	" February, 1936.
April 25, 1936	" March, 1936.
May 25, 1936	" April, 1936.
June 25, 1936	" May, 1936.
July 25, 1936	" June, 1936.

Seventeenth. Each of said returns last above mentioned was filed involuntarily and under written protest and under duress and compulsion of and in order to avoid the penalties

purported to be provided for and which might be imposed under said Local Law No. 21 for the year 1934, as amended by said Local Law No. 2 for the year 1935 and under said Local Law No. 30 for the year 1935 in the event of plaintiff's failure to make and file each of such returns.

Eighteenth. On the respective dates below specified [fol. 14] plaintiff paid to defendant the respective sums below specified, being the respective amounts of alleged excise tax purported to be for the privilege of exercising its franchise or franchises or of holding property, or of doing business in the City of New York claimed by the Comptroller of defendant to be due from the plaintiff under said Local Law No. 21 for the year 1934, as amended by Local Law No. 2 for the year 1935, and under said Local Law No. 30 for the year 1935, the amount paid being three per centum of the gross income of plaintiff returned and reported as aforesaid for the respective months hereinafter specified, to wit:

Date of Payment	Amount of Payment	Month on the Gross Income for Which the Payment Was Based
February 28, 1935	\$41,751.77	January, 1935
March 25, 1935	40,753.38	February, 1935
April 25, 1935	44,844.93	March, 1935
May 25, 1935	43,671.64	April, 1935
June 25, 1935	44,807.18	May, 1935
July 25, 1935	41,861.86	June, 1935
August 24, 1935	38,929.84	July, 1935
September 25, 1935	38,001.49	August, 1935
October 25, 1935	39,970.21	September, 1935
November 25, 1935	42,271.77	October, 1935
December 24, 1935	41,059.80	November, 1935
January 25, 1936	43,852.13	December, 1935
February 25, 1936	42,480.07	January, 1936
March 25, 1936	40,973.08	February, 1936
April 25, 1936	44,261.96	March, 1936
May 25, 1936	42,228.69	April, 1936
June 25, 1936	43,295.54	May, 1936
July 25, 1936	41,864.16	June, 1936
Total	\$756,879.50	

[fol. 15] Nineteenth. Each of said payments last above mentioned was made involuntarily and under written pro-

test and under duress and compulsion of and in order to avoid the penalties purported to be provided for and which might be imposed for the failure to make such payment under said Local Law No. 21 for the year 1934, as amended by said Local Law No. 2 for the year 1935, or under said Local Law No. 30 for the year 1935.

Twentieth. The plaintiff is required to pay and has paid annually in advance to the State of New York under and pursuant to the provisions of Section 183 of the Tax Law of the State of New York a franchise tax "for the privilege of exercising its corporate franchise or of holding property in this State" (State of New York);

Twenty-first. Plaintiff is required to pay and has paid annually in advance to the State of New York under and pursuant to the provisions of Section 185 of the Tax Law of the State of New York an additional franchise tax "for the privilege of exercising its corporate franchise or carrying on its business in such corporate or organized capacity within this state" (State of New York); which said tax is equal to five-tenths of one per centum of its gross earnings from all sources within the State of New York.

Twenty-second. In addition to the franchise taxes mentioned in the two preceding paragraphs the plaintiff is required to pay annually a special franchise tax on the value of its property in and its special franchises to use the streets of the city in the maintenance and operation of its railroads.

[fol 16] Twenty-third. Apart from the said taxes purported to be imposed by said Local Laws No. 21 of 1934, as amended, and No. 30 of 1935, the only taxes imposed or purported to be imposed by any laws adopted by the Municipal Assembly of the City of New York under and pursuant to the authority granted by Chapter 274 of the Laws of 1934 or Chapter 651 of the Laws of 1935, or 161 the purpose of amendment of same, and effective during the periods from January 1, 1934, to June 30, 1934, and

(1) a tax on the value of the property, which tax was imposed by the City of New York in 1934, and

(2) a tax on the value of the property, which tax was imposed by the City of New York in 1935, and

extent as it affected and applied to other persons and corporations,

(3) a tax upon the transfer of estates of decedents, and

(4) a so-called excise tax for the privilege of carrying on or exercising for gain or profit within the City of New York any trade, business, profession, vocation or commercial activity, other than a financial business, equal to 1/10 of 1% upon the receipts in excess of \$15,000 from such profession, vocation, trade, business or commercial activity exercised or carried on in the City of New York, and a so-called excise tax for the privilege of carrying on any financial business for gain or profit within the City of New York, equal to 1/5 of 1% upon the gross income in excess of \$5,000 received from such financial business carried on (for 17) in the City of New York, these taxes being imposed on all individuals, copartnerships, societies, associations, joint stock companies, corporations and combinations of individuals exercising such privileges, excepting, however, utilities subject to tax under said Local Laws No. 21 of 1934, as amended, and No. 30 of 1935, they being exempted from the said tax of 1/10 of 1% in respect to their "gross income" or "gross operating income," as the case might be, upon which they were taxed at the rate of 3% under said Local Laws No. 21 of 1934, as amended, and No. 30 of 1935.

No excise tax is or was during the period from January 1, 1933, to June 30, 1936, imposed by any law of the City of New York upon any person or corporation, other than a "utility," as defined in said Local Laws No. 21 of 1934, as amended, and No. 30 of 1935, for the privilege of exercising franchises or of holding property or of doing business in the City of New York, other than the said excise tax equal to 1/10 of 1% upon the receipts in excess of \$15,000 from any business carried on in the said City, excluding a financial business, and the said excise tax equal to 1/5 of 1% upon gross income in excess of \$5,000 received from any financial business carried on in the City of New York.

A copy of the City of New York Local Laws No. 21 of 1934, as amended, and No. 30 of 1935, is attached hereto for your information.

on their respective businesses in the State of New York, but also special franchise taxes on the values of their prop-
[fol. 18] erties in and their franchises to use public streets and other places.

Twenty-fifth. The rate of fare which plaintiff is permitted to charge for transportation of passengers on the system of railroads operated by it in the City of New York is and at all the times herein mentioned was limited to five cents per passenger, except that in certain instances the plaintiff is permitted to make an additional charge for transfers from one railroad line of the system to another.

Twenty-sixth. The defendant has refused to permit the plaintiff, together with other street railroad corporations, to charge a fare of more than five cents per passenger exclusive of charges for transfers.

Twenty-seventh. Neither the Transit Commission nor any other Commission or body has the power or authority to increase the rate of fare for transportation of passengers on the system of railroads operated by the plaintiff in the City of New York beyond the sum of five cents per passenger exclusive of charges for transfers.

Twenty-eighth. By virtue of Local Law No. 16 of the City of New York for the year 1925, adopted September 17, 1925, the Charter of the City of New York was amended so as to provide that the Local Authority of the City of New York, to wit, the Board of Estimate and Apportionment, was forbidden to consider any resolution to increase the fare of five cents then and now provided by law or by contract or franchise, unless and until the proposal of the adoption [fol. 19] of any such resolution shall have been first submitted to the people of the City of New York upon a referendum and approved by a majority vote of the qualified electors of such City.

Twenty-ninth. There is no law which the defendant is permitted to make the plaintiff pay more than five cents per passenger exclusive of charges for transfers from one railroad line of the system to another.

public any part of the so-called taxes collected from it by the defendant under the provisions of said local laws or any part of any other taxes which the plaintiff is required to pay, whereas other corporations which, under Local Law No. 17 of 1934 and Local Law No. 32 of 1935, were taxed at the rate of only one-tenth of one per centum on their gross receipts in excess of \$15,000 from business conducted in the City of New York were and are in a position to pass on to the public such taxes as they were or may be required to pay, by increasing their prices for the goods sold or the services furnished by them.

Thirtieth. At the respective times of enactment of the said Local Laws No. 21 of 1934, No. 2 of 1935 and No. 30 of 1935, the defendant itself was operating, through its Board of Transportation, rapid transit railroads in the City of New York which, during the period from January 1, 1906, to June 30, 1936, completed and still do complete directly with the railroads operated by the plaintiff, [Vol. 20] carrying passengers at a rate of five cents per passenger. Neither Division of the Department of Public Service has any supervision of or over the railroads thus operated by the Board of Transportation for the defendant, nor was the defendant, the City of New York, or its Board of Transportation, required to obtain from the Transit Commission or from either Division of the Department of Public Service a certificate of convenience and necessity for said railroads before constructing and operating the same. Some of said railroads constructed and operated by the defendant through its Board of Transportation run directly parallel to and on the same streets over and along which railroads are and for many years have been lawfully operated by the plaintiff, as, for instance, the new subway railroad in Jay, Smith and Ninth Streets, West and along which streets the plaintiff maintains and operates a street carline railroad known as the Smith Street Line, and the old elevated railroad of Fourth Street, West and other streets.

the plaintiff has no protection whatever against such competition. Plaintiff's receipts from the operation of its said Smith Street Line dropped more than \$12,000 per month after the commencement of operation of the said subway railroad of the defendant competing with said Smith Street Line.

[fol. 21] Thirty-first. At the time of the passage of said Local Law No. 21 of the City of New York for the year 1934, and at the time of the passage of said Local Law No. 2 of the City of New York for the year 1935, and also at the time of the passage of said Local Law No. 30 of the City of New York for the year 1935, upwards of ten thousand taxicabs were licensed and operated and still are licensed and operating in the City of New York for the transportation of persons for hire on, along and through the streets of the City of New York.

Thirty-second. Plaintiff is subjected to and has no protection against competition by taxicabs which are permitted by the defendant to operate and carry passengers for hire through the streets of the City of New York, including streets on which the railroads of the plaintiff are located. In many places in the City of New York taxicabs, both before and after the enactment of said local laws, have carried passengers long distances at a rate of fare of five cents per passenger over routes parallel to the routes of railroads owned and operated by the plaintiff and often along the same streets in which said railroads run, inducing persons who would otherwise have patronized the plaintiff's railroads to patronize the said taxicabs instead. The operation of the said taxicabs is not subject to supervision by the Transit Commission or either Division of the Department of Public Service.

Thirty-third. Neither said Local Law No. 21 of the City of New York for the year 1934, as amended by Local Law No. 2 of the City of New York for the year 1935, nor said Local Law No. 30 of the City of New York for the year 1935 purports to impose any tax on operators of [fol. 22] taxicabs for the privilege of doing business in the City of New York, and instead of being required to pay a tax of three per centum on their gross income under either of said local laws, they are required to pay a tax of only one-tenth of one per centum on their gross

income in excess of \$15,000 for the privilege of conducting such business, they being subject to Local Law No. 17 of the City of New York for the year 1934, and Local Law No. 32 of the City of New York for the year 1935.

Thirty-fourth. The aforesaid taxes, both those purported to be imposed by Local Law No. 21 for the year 1934 and said Local Law, as amended, and those purported to be imposed by Local Law No. 30 for the year 1935, as well as those purported to be imposed by Local Law No. 17 for the year 1934, and Local Law No. 32 for the year 1935, are all emergency taxes imposed by the City of New York under authority of said Chapter 873 of the Laws of 1934, or said Chapter 601 of the Laws of 1934, and all of the said taxes are or were imposed for the purpose of defraying the expenses of unemployment and home relief in the City of New York, which, on information and belief, is not a local but a state purpose.

Thirty-fifth. Although the unemployment emergency in New York City is a matter of state concern for the relief of which the state legislature could have enacted laws imposing state wide taxation, the said legislature, by authorizing a city of over one million inhabitants (the only such city being the City of New York) to impose any taxes which the state legislature could have imposed but limiting the power so as to prevent such city from taxing any property located or any business conducted or transacted outside the City of New York, did, in effect, through the City of New York as its delegated agent, impose taxes for a state purpose on utilities doing business in one part of the state without imposing any taxes on utilities doing similar business in other parts of the state.

Thirty-sixth. The operating and maintenance expenses of railroad corporations (including the plaintiff) engaged in the operation of subway, elevated and/or street surface railroads in the City of New York are far higher in proportion to gross receipts than the operating and maintenance expenses of corporations engaged in other types of business but included within the same class purported to be taxed by the provisions of said local laws No. 21 of 1934, No. 2 of 1935 and No. 30 of 1935. The ratio of net income to gross receipts is far higher in the case of corporations within the said class which are engaged in selling gas,

electricity, refrigeration, steam, water, telephone service and/or telegraph service than in the case of the plaintiff or any other railroad corporation which is included within the said class purported to be taxed by said local laws.

The net income for the calendar year 1935 of Brooklyn Edison Company, a corporation subject to the supervision of one of the divisions of the Department of Public Service and engaged in the business of selling electricity in the City of New York was, before deduction of taxes, approximately 42% of its gross receipts for the said calendar year.

The net income of the plaintiff for the calendar year 1935, before deduction of taxes, was approximately 14½% of its [fol. 24] gross receipts for the said calendar year.

Other street railroad corporations subject to the supervision of one of the divisions of the Department of Public Service and operating street railroads within the City of New York, while having substantial gross receipts from the conduct of their business during the year 1935, suffered a net loss for the said year and had no net income out of which to pay the said taxes purported to be imposed upon them by said Local Law No. 21 of 1934, as amended, so that the payment of said taxes under said local law simply added to their deficits.

Thirty-seventh. By reason of the facts stated in the preceding paragraph of this complaint, a tax of 3% of gross receipts imposed upon all corporations subject to the supervision of either division of the Department of Public Service is so far more burdensome upon some corporations within the taxed class than upon others as to make the distribution of the tax burden glaringly unequal within the class itself. The imposition of the tax is a plainly arbitrary method of collecting money for unemployment relief purposes in the easiest way without any thought of or attempt at equal distribution of the tax burden in proportion to benefits or to capacity to pay on the part of the respective persons and corporations taxed, or to the value of the privilege taxed.

Thirty-eighth. Each and all of said taxes purported to be imposed by said Local Law No. 21 for the year 1934, as amended, and by said Local Law No. 30 for the year [fol. 25] 1935, were illegally imposed, illegally collected and illegally received by the City of New York in that said Local

Law No. 21 for the year 1934 (both in its original form and as amended by Local Law No. 2 for the year 1935) and said Local Law No. 30 for the year 1935, and Chapter 873 of the Laws of 1934 and Chapter 601 of the Laws of 1935, under and pursuant to which said local laws, respectively, were purported to be enacted, are and each of them is illegal, unconstitutional, null and void, being in violation of Section 10 of Article I of the Constitution of the United States and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and Section 6 of Article I of the Constitution of the State of New York, for the following reasons, among others:

1. They impair the obligations of franchise contracts made by the City of New York and/or the State of New York with the plaintiff or its predecessors in title, which contracts are now held by the plaintiff and under which it operates its said railroads.

2. They deprive the plaintiff and others of property without due process of law in that

- (a) They make it impossible for the plaintiff to obtain a fair return on the value of its property devoted to public use in the operation of its railroads under said franchise contracts.

- (b) Under the guise of purporting to impose taxes they provide for the exaction of money from a small group or class of persons and corporations for the benefit of another group or class of individuals, the exaction being neither [fol. 26] what can properly be called a tax nor a part of any plan or regulation in which both groups are interested. The exaction is not a tax because it is not an exaction for the support of the government and because it is specifically provided by the said laws that the moneys collected by means of the exaction shall not go into the general fund of the City or State of New York but shall be put into a special bank account or bank accounts and be used for no other purpose than the relief of those who suffer because of unemployment.

- (c) The taxes purported to be imposed thereby are measured by a percentage of gross income without regard to the net income of or the ruinous effect upon the persons and corporations purported to be taxed.

(d) The persons and corporations purported to be taxed receive no benefits proportionate to the amounts of taxes they are required to pay under said local laws and are required by said local laws to pay the shares of others in the expense of a project which is of equal concern to all and which benefits the persons and corporations so taxed no more, in proportion to wealth, property or income, than any other person or corporation doing business in the City of New York.

3. They deny to the plaintiff and other corporations the equal protection of the law in that

[fol. 27] (a) Though being no part of any general or permanent plan of taxation, and though purporting to impose only emergency taxes for the purpose of unemployment relief, they arbitrarily single out one small group of persons and corporations and purport to tax them upon the privilege of holding property, doing business or exercising their franchises within the City of New York at a rate which is three thousand per cent higher than the rate of tax imposed for the same purpose upon other persons and corporations for the privilege of holding property, doing business or exercising their franchises within the City of New York, thereby arbitrarily and with hostile design placing a ruinous burden upon a special small group of persons and corporations in an attempt to make them pay far more than their fair share of the cost of the emergency relief, there being no sound or reasonable basis for the great discrimination against them.

(b) They purport to impose excise taxes on certain persons and corporations engaged in the transportation of passengers for hire within the City of New York without imposing similar taxes on other persons and corporations engaged in the transportation of passengers for hire and using the streets of the said City for the conduct of their business.

(c) Although the taxes purported to be imposed thereby are for a state purpose, they do not affect all persons and corporations in the same class throughout the state, but [fol. 28] affect only persons and corporations engaged in business or holding property within the City of New York without affecting persons and corporations engaged in the same character of business or holding the same kind of

property in any other part of the state outside the City of New York.

(d) The definition of the word "utility" contained in said local laws, which definition describes and determines the class of persons and corporations affected by the said laws, is such as to make the classification unreasonable and void, because, except as to the business of furnishing or selling gas, electricity, steam, water, refrigeration, telephone service and/or telegraph service, the character of the business in which any person or corporation may be engaged is not made the test of whether or not such person or corporation is within the class taxable under said laws, but the sole test thereof is whether or not such person or corporation is subject to the supervision of either Division of the Department of Public Service regardless of the character of his or its business. This results in bringing within the class purported to be taxed under the said laws, many persons and corporations, including plaintiff, the taxing of whom at the same rate and on the same basis as the taxing of persons and corporations engaged in the business of selling gas, electricity, steam, water, refrigeration, telephone service and/or telegraph service, and at a rate thirty times as high as the rate at which other persons and corporations [fol. 29] are taxed, is entirely unreasonable and unjustifiable.

(e) Even if it be reasonable to differentiate between utility corporations engaged in the business of selling gas, electricity, steam, water, refrigeration, telephone service and/or telegraph service and corporations engaged in other lines of business, and to tax such utility corporations at a far higher rate than other corporations for the privilege of exercising their franchises, or of holding property or of doing business in the City of New York, there is no reasonable basis for so differentiating between the plaintiff and corporations which are not utilities, and it is wholly unreasonable to include the plaintiff in the same class, for the purpose of taxation, with utility corporations engaged in the business of selling gas, electricity, steam, water, refrigeration, telephone service or telegraph service because such utility corporations meet with little or no competition and at the same time can protect themselves from the ruination which might otherwise result from excessive taxation by obtaining higher

rates for the utility service furnished by them if, in view of the taxes they are required to pay, the present rates fixed by the Public Service Commission prove to be confiscatory, whereas the plaintiff meets with substantial competition in the operation of new underground railroads by the City of New York, the taxing agent, itself, and in the operation of taxicabs, and, being helpless to obtain any increase in the rate of fare which it may charge its passengers, has no way of defending itself against confiscation and ruination resulting from excessive taxation.

(f) The said local laws purport to impose a tax measured by a percentage of gross receipts upon a class defined in such a way as to include corporations the respective businesses of which and so essentially different in character that the ratio of net income to gross receipts in the case of one is radically less than in the case of another, the result of which is that said local laws produce glaring inequality in the distribution of the tax burden within the taxed class itself, arbitrarily discriminating in favor of some and against other members of the class, and taxing some far more heavily than others on the value of the privilege taxed.

Thirty-ninth. Defendant had no power or authority to enact the said Local Laws No. 21 of 1934, No. 2 of 1935 and No. 30 of 1935, and the same are null and void insofar as they purport to impose excise taxes upon the plaintiff in this action. Neither Chapter 873 of the Laws of 1934, nor Chapter 601 of the Laws of 1935, specifically empowers or shows any clear intent on the part of the State Legislature to empower any city to impose an excise tax, for the privilege of doing business, upon a street railroad corporation against which the City, the taxing agent, itself, directly competes by operating railroads of its own carrying passengers at a rate of fare of five cents per passenger, the income from which railroads is not subjected to the same tax. It is so unfair, unreasonable and contrary to good public policy that a city should be allowed to impose an excise tax upon a street railroad corporation against which the City itself directly competes in the business of carrying passengers for hire, particularly where the income from the railroads operated by the City in competition with the railroads operated by the

said railroad corporation is not subject to the same tax as is the income from the latter, that no authority to impose such tax, whereby it may destroy or handicap its competitor without hurting its own business, can be deemed to have been granted to the City by the State Legislature under any general grant of powers of taxation and without language in an enabling act showing clear intent on the part of the State Legislature to grant such power.

Fortieth. By reason of all the foregoing, the exactions by the defendant from the plaintiff of the payments heretofore made under protest by the plaintiff as set forth in paragraph Eighteenth of this complaint were illegal, void and without authority.

Forty-first. All of the said moneys paid over by the plaintiff to the defendant as set forth in paragraph Eighteenth of this complaint amounting to a total of \$756,879.50 are the property of and belong to the plaintiff and constitute moneys had and received by the defendant belonging to and for the benefit of the plaintiff.

Forty-second. The said sum of \$756,879.50 paid by the plaintiff to the defendant as aforesaid was received by the [fol. 32] defendant, has been and still is retained by it and the defendant has refused and still refuses to repay the same or any part thereof to the plaintiff although the plaintiff has duly demanded such repayment.

Forty-third. On or about the 13th day of August, 1936, plaintiff duly presented its written demand and claim upon which this action is founded to the Comptroller of the City of New York for adjustment and more than thirty days have elapsed since said demand and claim upon which this action is founded were presented to said Comptroller for adjustment and he has neglected and refused to make adjustment or payment thereof for thirty days after such presentment.

Forty-fourth. There is now due and owing from the defendant to the plaintiff the sum of \$756,879.50, with interest thereon from the respective dates on which the payments totalling said \$756,879.50 were made, as set forth in paragraph Eighteenth of this complaint.

Wherefore, plaintiff demands judgment against the defendant for the sum of \$756,879.50, with interest thereon as follows:

On \$41,751.77 from February 28, 1935,
On \$40,753.38 from March 25, 1935,
On \$44,844.93 from April 25, 1935,
On \$43,671.64 from May 25, 1935,
On \$44,807.18 from June 25, 1935,
On \$41,861.86 from July 25, 1935,
On \$38,929.84 from August 24, 1935,
On \$38,001.49 from September 25, 1935,
On \$39,970.21 from October 25, 1935,
[fol. 33] On \$42,271.77 from November 25, 1935,
On \$41,059.80 from December 24, 1935,
On \$43,852.13 from January 25, 1936,
On \$42,480.07 from February 25, 1936,
On \$40,973.08 from March 25, 1936,
On \$44,261.96 from April 25, 1936,
On \$42,228.69 from May 25, 1936,
On \$43,295.54 from June 25, 1936,
On \$41,864.16 from July 25, 1936.

together with the costs and disbursements of this action.

George D. Yeomans, Attorney for Plaintiff, Office
and P. O. Address, 385 Flatbush Avenue Extension,
Brooklyn, New York.

(Verified by W. S. Menden, President of the Brooklyn
and Queens Transit Corporation, on October 9, 1936.)

[fol. 34] EXHIBIT "A" ANNEXED TO AMENDED COMPLAINT
(CHAPTER 873 OF THE LAWS OF 1934)

AN ACT to enable, temporarily, any city of the state having a population of one million inhabitants or more to adopt and amend local laws, imposing in any such city any tax and/or taxes which the legislature has or would have power and authority to impose to relieve the people of any such city from the hardships and suffering caused by unemployment and to limit the application of such local laws.

Became a law August 18, 1934, with the approval of the Governor. Passed, on emergency message, by a two-thirds vote.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Notwithstanding any other provision of law to the contrary, any city of the state having a population of one million inhabitants or more acting through its local legislative body, is hereby authorized and empowered until December thirty-first, nineteen hundred thirty-five to adopt and amend local laws imposing in any such city any tax and/or taxes which the legislature has or would have power and authority to impose to relieve the people of any such city from the hardships and suffering caused by unemployment and make provision for the collection thereof by the chief fiscal officer of any such city. The tax or taxes imposed pursuant to such local laws shall be effective only during the period commencing when this act becomes effective and ending December thirty-first, nineteen hundred thirty-five, or any portion of such period. A tax imposed hereunder shall have application only within the territorial [fol. 35] limits of any such city and shall be in addition to any and all other taxes.

This act shall not authorize the imposition of a tax on any transaction originating and/or consummated outside of the territorial limits of any such city, notwithstanding that some act be necessarily performed with respect to such transaction within such limits.

This act shall not authorize the imposition of a tax on a non-resident of such city or on account of any transaction by or with a non-resident of such city, except when imposed

without discrimination as between residents and non-residents, on account of tangible property actually located or income earned, or trades, businesses or professions carried on within such city, or on account of transfers, retail sales or other transactions actually made or consummated within such city by a non-resident while within such city. A corporation shall not be deemed a non-resident by reason of the fact its principal place of business is not within the city.

A person who has a permanent place of abode without such city and lives more than seven months of the year out of such city shall be deemed a non-resident within the meaning of this act.

Provided, however, that nothing herein contained shall limit or prevent the imposition of a tax on gross income or a tax on gross receipts of persons, firms and corporations doing business in any such city. No such person, firm or corporation, however, shall be subject to the imposition of more than one tax by any such city on gross income or gross receipts under the provisions of this act.

§ 2. Revenues resulting from the imposition of taxes authorized by this act shall be paid into the treasury of any [fol. 36] such city and shall not be credited or deposited in the general fund of any such city, but shall be deposited in a separate bank account or accounts and shall be available and used solely and exclusively for the relief purposes for which the said taxes have been imposed under the provisions of this act.

Such legislative body may authorize the performance of public work for the relief purposes aforesaid to be paid for out of the tax or taxes, imposed under this act, and which may be undertaken other than by contract by such municipal corporation, during the period aforesaid, through and under its local emergency work bureau or by its public welfare or other department under the supervision and control of its local emergency work bureau. These provisions shall be effective notwithstanding any provisions contained in any charter, or in any general, special or local laws to the contrary and notwithstanding any such provisions therein contained requiring such work as may be undertaken to be let by contract.

§ 3. This act shall take effect immediately.

[fol. 37] EXHIBIT "B" ANNEXED TO AMENDED COMPLAINT
(CHAPTER 601 OF THE LAWS OF 1935)

AN ACT to amend chapter eight hundred and seventy-three of the laws of nineteen hundred thirty-four, entitled "An Act to enable, temporarily, any city of the state having a population of one million inhabitants or more to adopt and amend local laws, imposing in any such city any tax and/or taxes which the legislature has or would have power and authority to impose to relieve the people of any such city from the hardships and suffering caused by unemployment and to limit the application of such local laws," in relation to extending until July first, nineteen hundred thirty-six the time within which the power conferred by such act may be exercised and excepting from such power the right to impose taxes on incomes or upon the transfers of estates of deceased persons

Became a law April 29, 1935, with the approval of the Governor. Passed, by a two-thirds vote, on emergency message and message of necessity.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Sections one and two of chapter eight hundred and seventy-three of the laws of nineteen hundred thirty-four, entitled "An act to enable, temporarily, any city of the state having a population of one million inhabitants or more to adopt and amend local laws, imposing in any such city any tax and/or taxes which the legislature has or would have power and authority to impose to relieve the people of any such city from the hardships and suffering caused by unemployment and to limit the application of such local laws" are hereby amended to read as follows:

§ 1. Notwithstanding any other provision of law to the contrary, any city of the state having a population of one million inhabitants or more acting through its local legislative body, is hereby authorized and empowered until July first, nineteen hundred thirty-six to adopt and amend local laws imposing in any such city any tax and/or taxes which the legislature has or would have power and authority to impose to relieve the people of any such city from the hardships and suffering caused by unemployment and make pro-

vision for the collection thereof by the chief fiscal officer of any such city. The tax or taxes imposed pursuant to such local laws shall be effective only during the period commencing when this act becomes effective and ending July first, nineteen hundred thirty-six, or any portion of such period. A tax imposed hereunder shall have application only within the territorial limits of any such city and shall be in addition to any and all other taxes.

This act shall not authorize the imposition of a tax on incomes or upon the transfers of estates of deceased persons.

This act shall not authorize the imposition of a tax on any transaction originating and/or consummated outside of the territorial limits of any such city, notwithstanding that some act be necessarily performed with respect to such transaction within such limits.

This act shall not authorize the imposition of a tax on a non-resident of such city or on account of any transaction by or with a non-resident of such city, except when imposed [fol. 39] without discrimination as between residents and non-residents, on account of tangible property actually located or income earned, or trades, businesses or professions carried on within such city, or on account of transfers, retail sales or other transactions actually made or consummated within such city by a non-resident while within such city. A corporation shall not be deemed a non-resident by reason of the fact its principal place of business is not within the city.

A person who has a permanent place of abode without such city and lives more than seven months of the year out of such city shall be deemed a non-resident within the meaning of this act.

Provided, however, that nothing herein contained shall limit or prevent the imposition of a tax on gross incomes or a tax on gross receipts of persons, firms and corporations doing business in any such city. No such person, firm or corporation, however, shall be subject to the imposition of more than one tax by any such city on gross income or gross receipts under the provisions of this act.

§ 2. Revenues resulting from the imposition of taxes authorized by this act shall be paid into the treasury of any such city and shall not be credited or deposited in the general fund of any such city, but shall be deposited in a separate bank account or accounts and shall be available and

used solely and exclusively for paying the principal amount of any installment of principal and of interest due during the aforesaid period on account of the ten-year serial bonds sold to obtain moneys to pay for home relief and work relief in any such city in the month of November, nineteen hundred [fol. 40] thirty-three, and for the relief purposes for which the said taxes have been imposed under the provisions of this act.

Such legislative body may authorize the performance of public work for the relief purposes aforesaid to be paid for out of the tax or taxes, imposed under this act, and which may be undertaken other than by contract by such municipal corporation, during the period aforesaid, through and under its local emergency work bureau or by its public welfare or other department under the supervision and control of its local emergency work bureau. These provisions shall be effective notwithstanding any provisions contained in any charter, or in any general, special or local laws to the contrary and notwithstanding any such provisions therein contained requiring such work as may be undertaken to be let by contract.

§ 3. This act shall take effect immediately.

[fol. 41] EXHIBIT "C" ANNEXED TO AMENDED COMPLAINT
(LOCAL LAW NO. 21 OF 1934 AS AMENDED BY LOCAL LAW
No. 2 OF 1935)

A Local Law to relieve the people of the city of New York from the hardships and suffering caused by unemployment and the effects thereof on the public health and welfare, by imposing an excise tax on the gross income of every person doing business within such city and subject to supervision of either division of the department of public service, and of any and all other utilities doing business within such city to enable such city to defray the cost of granting unemployment, work and home relief.

Be it enacted by the Municipal Assembly of the City of New York as follows:

§ 1

Definitions.—When used in this local law:

(a) The word "person" or the plural thereof, includes and shall be deemed to refer to and mean corporations, com-

panies, associations, joint stock associations, copartnerships, estates, assignees of rents, any person acting in a fiduciary capacity and/or persons, their assignees, lessees, trustees or receivers appointed by any court whatsoever, or by any other means.

(b) The word "comptroller" shall be deemed to refer to and mean the comptroller of the city of New York.

(c) The words "gross income" shall be deemed to refer to and include receipts received in or by reason of any sale made (except the sale of real property) or service rendered [fol. 42] in the city of New York, including cash, credits and property of any kind or nature (whether or not such sale is made or such service is rendered for profit) without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or services or other costs, interest or discount paid, or any other expense whatsoever; also profits from the sale of securities; also profits from the sale of real property growing out of the ownership or use of or interest in such property; also profit from the sale of personal property (other than property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the period for which a return is made); also receipts from interest, dividends, [rents] and royalties without any deductions therefrom for any expenses whatsoever incurred in connection with the receipt thereof, and also gains or profits from any source whatsoever.

(d) The words "gross operating income" shall be deemed to refer to and include receipts received in or by reason of any sale made or service rendered, of the property and services specified in subdivision (c) of this section, in the City of New York, including cash, credits and property of any kind or nature, without any deduction therefrom on account of the cost of the property sold, the cost of the materials used, labor or services or other costs, interest or discount paid, or any other expenses whatsoever.

[d] (e) The word "utility" shall be deemed to refer to and mean any person subject to the supervision of either division of the department of public service and every person whether or not such person is subject to such supervision who shall engage in the business of furnishing or

[fol. 43] selling to other persons, gas, [electric], electricity, steam, water, refrigeration, telephony, and/or telegraphy, or who shall engage in the business of furnishing or selling to other persons, gas, electric, steam, water, refrigeration, telephone or telegraph service [whether or not such person is subject to supervision by the department of public service.]

(f) The word "return" includes any amended return filed or required to be filed as herein provided.

§ 2

Imposition of Excise Tax.—Notwithstanding any other provision of law to the contrary, for the privilege of exercising its franchise or franchises, or of holding property, or of doing business in the city of New York, during the calendar year nineteen hundred thirty-five or any part thereof, every utility doing business in the city of New York and subject to the supervision of either division of the department of public service, shall pay to the comptroller of the city of New York an excise tax which shall be equal to three per centum of its gross income for the calendar year nineteen hundred and thirty-five and every other utility doing business in the city of New York shall pay to the comptroller of the city of New York an excise tax which shall be equal to three per centum of its gross operating income for the calendar year nineteen hundred thirty-five. Such tax shall be in addition to any and all other taxes and fees imposed by any other provision of law and shall be paid at the time and in the manner hereinafter provided, but any utility subject to tax hereunder shall not be liable to any tax under Local Law No. 17 of the [fol. 44] local laws of the city of New York for the year 1934 [...] with respect to its gross income or gross operating income as the case may be.

For the purpose of proper administration of this local law and to prevent evasion of the tax hereby imposed, it shall be presumed that the gross revenues or income of any such utility are derived from business conducted wholly within the territorial limits of the city of New York until the contrary is established, and the burden of proving that any part of its gross revenues or income is not so derived shall be upon such utility.

§ 3

Records to Be Kept.—Every utility subject to tax hereunder shall keep such records of its business and in such form as the comptroller may by regulation require. Such records shall be offered for inspection and examination at any time upon demand by the comptroller or his duly authorized agent or employee and shall be preserved for a period of three years, except that the comptroller may consent to their destruction within that period or may require that they be kept longer.

§ 4

Returns: Requirements as to.—On or before the twenty-fifth day of February, nineteen hundred and thirty-five, and on or before the twenty-fifth day of every month thereafter until the twenty-fifth day of January, nineteen hundred and thirty-six, every utility subject to tax hereunder shall file a return with the comptroller on a form to be furnished by the comptroller. Such return shall state the gross income or *gross operating income as the case may be* [fol. 45] for the preceding calendar month and shall contain any other data, information or matter which the comptroller may require to be included therein. The comptroller may require at any further time a supplemental return hereunder, which shall contain any data upon such matters as the comptroller may specify.

Every return required hereunder shall have annexed thereto an affidavit of the head of every such business making the same, or of the owner or of a copartner thereof, or of the principal officer of the corporation if such business be conducted by a corporation, to the effect that the statements contained therein are true.

The comptroller may require amended returns to be filed within twenty days after notice and to contain the information specified in the notice.

§ 5

Payment of Tax.—At the time of filing a return, as provided under section four hereof, each utility shall pay to the comptroller such portion of the tax imposed by this local law as is equal to three per centum of its gross income or *gross operating income as the case may be* for the period

covered by such return. Such portion of the tax shall be due and payable on the last day on which the return for such period is required to be filed, regardless of whether a return is filed or whether the return which is filed correctly indicates the amount of tax due.

§ 6

Determination of Tax by Comptroller.—In case the return required by section four hereof shall be insufficient or [fol. 46] unsatisfactory to the comptroller, or if such return is not made as required, and if the maker fails to file a corrected or sufficient return within twenty days after the same is required by notice from the comptroller, the comptroller shall determine the amount of tax due from such information as he is able to obtain, and if necessary, may estimate the tax on the basis of external indices. The comptroller shall give notice of such determination to the person liable for such tax. Such determination shall finally and irrevocably fix such tax unless the person against whom it is assessed shall within thirty days after the giving of notice of such determination apply to the comptroller for a hearing or unless the comptroller of his own motion shall reduce the same. After such hearing the comptroller shall give notice of his decision to the person liable for the tax. The determination of the comptroller may be reviewed by certiorari if application therefor is made within thirty days after the giving of notice of such determination.

An order of certiorari shall not be granted unless the amount of any tax sought to be reviewed, with penalties thereon, if any, shall be first deposited with the comptroller and an undertaking filed with the comptroller in such amount and with such sureties as a justice of the supreme court shall approve, to the effect that if such order be dismissed or the tax confirmed the applicant for the writ will pay all costs and charges which may accrue in the prosecution of the certiorari proceeding.

§ 7

Proceedings to Recover Tax.—Whenever any person shall fail to pay any tax or part thereof or penalty imposed by this local law as in this local law provided, the corporation counsel of the city of New York shall,

upon the request of the comptroller, bring an action in the name of the city of New York to enforce payment of the same.

As an additional or alternate remedy, the comptroller may issue a warrant, directed to the sheriff of any county within the city of New York, commanding him to levy upon and sell the real and personal property of the person from whom the tax is due, which may be found within his county, for the payment of the amount thereof, with any penalties, and the cost of executing the warrant, and to return such warrant to the comptroller and to pay to him the money collected by virtue thereof within sixty days after the receipt of such warrant. The sheriff shall within five days after the receipt of the warrant file with the clerk of his county a copy thereof, and thereupon such clerk shall enter in the judgment docket the name of the person mentioned in the warrant and the amount of the tax and penalties for which the warrant is issued and the date when such copy is filed. Thereupon the amount of such warrant so docketed shall become a lien upon the title to and interest in real property and chattels real of the person against whom the warrant is issued in the same manner as a judgment duly docketed in the office of such clerk. The sheriff shall then proceed upon the warrant in the same manner, and with like effect, as that provided by law in respect to executions issued against property upon judgments of a court of record, and for his services in executing the warrant he shall be entitled to the same fees, which he may collect in the same manner.

[fol. 48] In the discretion of the comptroller, a warrant of like terms, force and effect may be issued and directed to any officer or employee of the department of finance of the city of New York and in the execution thereof such officer or employee shall have all the powers conferred by law upon sheriffs, but he shall be entitled to no fee or compensation in excess of the actual expenses paid in the performance of such duty. If a warrant is returned not satisfied in full, the comptroller may from time to time issue new warrants and shall also have the same remedies to enforce the amount due thereunder as if the city of New York had recovered judgment therefor and execution thereon had been returned unsatisfied.

§ 8

Notices and Limitation of Time.—Any notice authorized or required under the provisions of this local law may be given by mailing the same to the person for whom it is intended in a post-paid envelope addressed to such person at the address given in any return filed by him pursuant to the provisions of this local law or if no return has been filed then to such address as may be obtainable. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this local law by the giving of notice shall commence to run from the date of mailing of such notice.

The provisions of the civil practice act relative to the limitation of time for the enforcement of a civil remedy shall not apply to any proceeding or action taken to levy, appraise, assess, determine or enforce the collection of any tax or penalty provided by this local law.

[fol. 49]

§ 9

Penalties.—Any person failing to file a return or corrected return, or to pay any tax or any portion thereof within the time required by this local law shall be subject to a penalty of five per centum of the amount of tax due, plus one per centum of such tax for each month of delay or fraction thereof excepting the first month after such return was required to be filed or such tax became due; but the comptroller, if satisfied that the delay was excusable, may remit all or any part of such penalty. Such penalty shall be paid to the comptroller and disposed of in the same manner as other receipts under this local law. Unpaid penalties may be enforced in the same manner as the tax imposed by this local law.

Any person and any officer of a corporation or copartner filing or causing to be filed any return, certificate, affidavit or statement required or authorized by this local law which is willfully false and any person who shall fail to file a return as required under this local law, and the officers of any corporation which shall so fail, shall be guilty of a misdemeanor, punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year; or both such fine and imprisonment.

The certificate of the comptroller to the effect that a tax has not been paid, that a return has not been filed, or that information has not been supplied pursuant to the provisions of this local law shall be prima facie evidence thereof.

[fol. 50]

§ 10

Refunds.—If within one year from the payment of any tax or penalty the payer thereof shall make application for a refund thereof and the comptroller or the court shall determine that such tax or penalty, or any portion thereof was erroneously or illegally collected, the comptroller shall refund the amount so determined. For like cause and within the same period a refund may be so made on the initiative of the comptroller. Whenever a refund is made the comptroller shall state his reasons therefor in writing. However, no refund shall be made of a tax or penalty paid pursuant to a determination of the comptroller as provided in section six of this local law unless the comptroller after a hearing as in said section provided or of his own motion, shall have reduced the tax or penalty or it shall have been established in a certiorari proceeding that such determination was erroneous or illegal, in which event a refund shall be made as above provided upon the determination of such proceeding.

An application for a refund made as herein provided shall be deemed an application for a revision of any tax or penalty complained of and the comptroller may receive additional evidence with respect thereto. After making his determination the comptroller shall give notice thereof to the person interested and he shall be entitled to a certiorari order to review such determination, subject to the provision of section six in respect thereto.

[fol. 51]

§ 11

General Powers of Comptroller.—In the administration of this local law the comptroller shall:

First. Make such reasonable rules and regulations, not inconsistent with law, as may be necessary for the exercise of his powers and the performance of his duties under this local law, and prescribe the form of blanks, reports and other records relating to the administration and enforcement of this local law.

Second. Assess, determine, revise, readjust and impose the taxes authorized to be imposed under this local law.

Third. Take testimony and proofs, under oath, with reference to any matter within the line of his official duty under this local law or he may designate and duly authorize an employee to act in his place for that purpose.

Fourth. To request information from the tax commission of the State of New York or the United States collector of internal revenue relative to any person, and to afford information to such tax commission or such collector of internal revenue relative to any person, any other provision in this local law to the contrary notwithstanding.

§ 12

Administration of Oaths and Compelling Testimony.—The comptroller or his employee duly designated and authorized by the comptroller shall have power to administer oaths and take affidavits in relation to any matter or proceeding in the exercise of the powers and duties of the comptroller under this local law. The comptroller shall have power to subpoena and require the attendance of witnesses and the production of books, papers and documents pertinent to the investigations and inquiries which he is authorized to conduct under this local law, and to examine them in relation to any matter which he has power to investigate hereunder and to issue commissions for the examination of witnesses who are out of the state or unable to attend before him or excused from attendance.

A justice of the supreme court either in court or at chambers shall have power summarily to enforce by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers and documents called for by the subpoena of the comptroller hereunder.

Any person who shall testify falsely in any material matter pending before the comptroller hereunder shall be guilty of a misdemeanor and punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment.

The officers who serve the comptroller's summons or subpoena hereunder and witnesses attending in response thereto

shall be entitled to the same fees as are allowed to officers and witnesses in civil cases in courts of record.

§ 13

Returns to be secret.—Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for the comptroller or any officer or employee of the department of finance to divulge or make known in any [fol. 53] manner, the receipts or any other information relating to the business of a taxpayer contained in any return required under this local law.

The officers charged with the custody of such returns shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court, except on behalf of the city of New York or of the comptroller, or on behalf of any party to any action or proceeding under the provisions of this local law when the returns or fact shown thereby are directly involved in such action or proceeding, in either of which events, the court may require the production of, and may admit in evidence, so much of said returns or of the fact shown thereby, as are pertinent to the action or proceeding and no more.

Nothing herein shall be construed to prohibit the delivery to a taxpayer or his duly authorized representative of a certified copy of any return filed in connection with his tax, nor to prohibit the publication of statistics so classified as to prevent the identification of particular returns and the items thereof or the inspection by the corporation counsel of the city of New York or other legal representatives of such city of the return of any taxpayer who shall bring action or proceeding to set aside or review the tax based thereon, or against whom an action or proceeding has been instituted or is contemplated for the collection of a tax or penalty. Returns shall be preserved for three years and thereafter until the comptroller orders them to be destroyed.

[fol. 54]

§ 14

Disposition of Revenues.—All revenues and moneys resulting from the imposition of the taxes imposed by this local law shall be paid into the treasury of the city of New York and shall not be credited or deposited in the general fund of the city of New York but shall be deposited in a

separate bank account or accounts, and shall be available and used solely and exclusively for the purpose of relieving the people of the city of New York from the hardships and suffering caused by unemployment, including the repayment of moneys borrowed for such purpose.

§ 15

Application: Construction.—If any provision of this local law, or the application thereof to any person or circumstances, is held invalid, the remainder of this local law, and the application of such provisions to other persons or circumstances, shall not be affected thereby. This local law shall be construed in conformity with chapter eight hundred and seventy-three, laws of one thousand nine hundred and thirty-four, pursuant to which it is enacted.

§ 16

Effective Date.—This local law shall take effect immediately.

[fol. 55] **EXHIBIT "D" ANNEXED TO AMENDED COMPLAINT.**
(LOCAL LAW NO. 30 OF 1935)

A Local Law

To relieve the people of the city of New York from the hardships and suffering caused by unemployment and the effects thereof on the public health and welfare, by imposing an excise tax on the gross income of every person doing business within such city and subject to supervision of either division of the department of public service, and of any and all other utilities doing business within such city to enable such city to defray the cost of granting unemployment work and home relief.

Be it enacted by the Municipal Assembly of The City of New York as follows:

§1

Definitions.—When used in this local law:

(a) The word "Person," or the plural thereof, includes and shall be deemed to refer to and mean corporations, companies, associations, joint stock associations, co-part-

nerships, estates, assignees or rents, any person acting in fiduciary capacity and/or persons, their assignees, lessees, trustees or receivers appointed by any court whatsoever, or by any other means.

(b) The word "comptroller" shall be deemed to refer to and mean the comptroller of the city of New York.

(c) The words "gross income" shall be deemed to refer to and include receipts received in or by reason of any sale made (except sale of real property) or service rendered in the city of New York, including cash, credits and property [fol. 56] of any kind or nature (whether or not such sale is made or such service is rendered for profit) without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or services or other costs, interest or discount paid, or any other expense whatsoever; also profits from the sale of securities; also profits from the sale of real property growing out of the ownership or use of or interest in such property; also profits from the sale of personal property (other than property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the period for which a return is made); also receipts from interest, dividends and royalties without any deductions therefrom for any expenses whatsoever incurred in connection with the receipt thereof, and also gains or profits from any source whatsoever.

(d) The words "gross operating income" shall be deemed to refer to and include receipts received in or by reason of any sale made or service rendered, of the property and services specified in subdivision (e) of this section, in the city of New York, including cash, credits and property of any kind or nature, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or services or other costs, interests or discount paid, or any other expenses whatsoever.

(e) The word "utility" shall be deemed to refer to and mean any person subject to the supervision of either division of the department of public service, and every person whether or not such person is subject to such supervision [fol. 57] who shall engage in the business of furnishing or selling to other persons gas, electricity, steam, water,

refrigeration, telephony and/or telegraphy or who shall engage in the business of furnishing or selling to other persons gas, electric, steam, water refrigeration, telephone or telegraph service.

(f) The word "return" includes any amended return filed or required to be filed as herein provided.

§ 2

Imposition of Excise Tax.—Notwithstanding any other provision of law to the contrary, for the privilege of exercising its franchise or franchises, or of holding property, or of doing business in the city of New York, from January first, nineteen hundred and thirty-six, to June thirtieth, nineteen hundred and thirty-six, or any part of such period, every utility doing business in the city of New York and subject to the supervision of either division of the department of public service, shall pay to the comptroller of the city of New York an excise tax which shall be equal to three per centum of its gross income for the period from January first, nineteen hundred and thirty-six to June thirtieth, nineteen hundred and thirty-six, and every other utility doing business in the city of New York shall pay to the comptroller of the city of New York an excise tax which shall be equal to three per centum of its gross operating income for the period from January first, nineteen hundred and thirty-six, to June thirtieth, nineteen hundred and thirty-six. Such tax shall be in addition to any and all other taxes and fees imposed by any other provision of law and shall be paid at the time and in the manner here-[fol. 58] inafter provided, but any utility subject to tax hereunder shall not be liable to any tax under local law of the local laws of the city of New York of the year nineteen hundred and thirty-five, board of estimate and apportionment introductory number ninety-five of the year nineteen hundred and thirty-five, with respect to its gross income or gross operating income as the case may be.

For the purpose of proper administration of this local law and to prevent evasion of the tax hereby imposed, it shall be presumed that the gross revenues or income of any such utility are derived from business conducted wholly within the territorial limits of the city of New York until the contrary is established, and the burden of proving that

any part of its gross revenues or income is not so derived shall be upon such utility.

§ 3

Records to be Kept.—Every utility subject to tax hereunder shall keep such records of its business and in such form as the comptroller may by regulation require. Such records shall be offered for inspection and examination at any time upon demand by the comptroller or his duly authorized agent or employee and shall be preserved for a period of three years, except that the comptroller may consent to their destruction within that period or may require that they be kept longer.

§ 4

Returns; Requirements as to.—On or before the twenty-fifth day of February, nineteen hundred thirty-six, and on or before the twenty-fifth day of every month thereafter until the twenty-fifth day of July, nineteen hundred thirty-[fol. 59] six, every utility subject to tax hereunder shall file a return with the comptroller on a form to be furnished by the comptroller. Such return shall state the gross income or gross operating income as the case may be for the preceding calendar month, and shall contain any other data, information or matter which the comptroller may require to be included therein. The comptroller may require at any further time a supplemental return hereunder, which shall contain any data upon such matters as the comptroller may specify.

Every return required hereunder shall have annexed thereto an affidavit of the head of every such business making the same, or of the owner or of a co-partner thereof, or of the principal officer of the corporation if such business be conducted by a corporation, to the effect that the statements contained therein are true.

The comptroller may require amended returns to be filed within twenty days after notice and to contain the information specified in the notice.

§ 5

Payment of Tax.—At the time of filing of return, as provided under section four hereof, each utility shall pay to the comptroller such portion of the tax imposed by this

local law as is equal to three per centum of its gross income or gross operating income as the case may be for the period covered by such return. Such portion of the tax shall be due and payable on the last day on which the return for such period is required to be filed, regardless of whether a return is filed or whether the return which is filed correctly indicates the amount of tax due.

[fol. 60]

§ 6

- Determination of Tax by Comptroller.—In case the return required by section four hereof shall be insufficient or unsatisfactory to the comptroller, or if such return is not made as required, and if the maker fails to file a corrected or sufficient return within twenty days after the same is required by notice from the comptroller, the comptroller shall determine the amount of tax due from such information as he is able to obtain, and if necessary, may estimate the tax on the basis of external indices. The comptroller shall give notice of such determination to the person liable for such tax. Such determination shall finally and irrevocably fix such tax unless the person against whom it is assessed shall within thirty days after the giving of notice of such determination apply to the comptroller for a hearing or unless the comptroller of his own motion shall reduce the same. After such hearing the comptroller shall give notice of his decision to the person liable for the tax. The determination of the comptroller may be reviewed by certiorari if application therefor is made within thirty days after the giving of notice of such determination.

An order of certiorari shall not be granted unless the amount of any tax sought to be reviewed with penalties thereof, if any, shall be first deposited with the comptroller and an undertaking filed with the comptroller, in such amount and with such sureties as a justice of the supreme court shall approve, to the effect that if such order be dismissed or the tax confirmed the applicant for the writ will pay all costs and charges which may accrue in the prosecution of the certiorari proceeding.

[fol. 61]

§ 7

Proceedings to Recover Tax. Whenever any person shall fail to pay any tax or part thereof or penalty imposed by

this local law, as in this local law provided, the corporation counsel of the city of New York shall, upon the request of the comptroller, bring an action in the name of the city of New York to enforce payment of the same.

As an additional or alternate remedy, the comptroller may issue a warrant directed to the sheriff of any county within the city of New York, commanding him to levy upon and sell the real and personal property of the person from whom the tax is due, which may be found within his county, for the payment of the amount thereof, with any penalties, and the cost of executing the warrant, and to return such warrant to the comptroller and to pay to him the money collected by virtue thereof within sixty days after the receipt of such warrant. The sheriff shall within five days after the receipt of the warrant file with the clerk of his county a copy thereof, and thereupon such clerk shall enter in the judgment docket the name of the person mentioned in the warrant and the amount of the tax and penalties for which the warrant is issued and the date when such copy is filed. Thereupon the amount of such warrant so docketed shall become a lien upon the title to and interest in real property and chattels real of the person against whom the warrant is issued in the same manner as a judgment duly docketed in the office of such clerk. The sheriff shall then proceed upon the warrant in the same manner and with like effect, as that provided by law in respect to executions issued against property upon judgments of a court of record, and for his services in executing the war-[fol. 62] rant he shall be entitled to the same fees, which he may collect in the same manner.

In the discretion of the comptroller a warrant of like terms, force and effect, may be issued and directed to any officer or employee of the department of finance of the city of New York and in the execution thereof such officer or employee shall have all the powers conferred by law upon sheriffs, but he shall be entitled to no fee or compensation in excess of the actual expenses paid in the performance of such duty. If a warrant is returned not satisfied in full, the comptroller may from time to time issue new warrants and shall also have the same remedies to enforce the amount due thereunder as if the city of New York had recovered judgment therefor and execution thereon had been returned unsatisfied.

§ 8

Notices and Limitation of Time.—Any notice authorized or required under the provisions of this local law may be given by mailing the same to the person for whom it is intended in a post-paid envelope addressed to such person at the address given in any return filed by him pursuant to the provisions of this local law or if no return has been filed then to such address as may be obtainable. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this local law by the giving of notice shall commence to run from the date of mailing of such notice.

The provisions of the civil practice act relative to the limitation of time for the enforcement of a civil remedy shall not apply to any proceeding or action taken to levy, [fol. 63] appraise, assess, determine or enforce the collection of any tax or penalty provided by this local law.

§ 9

Penalties.—Any person failing to file a return or corrected return or to pay any tax or any portion thereof within the time required by this local law, shall be subject to a penalty of five per centum of the amount of tax due, plus one per centum of such tax for each month of delay or fraction thereof excepting the first month after such return was required to be filed or such tax became due; but the comptroller, if satisfied that the delay was excusable, may remit all or any part of such penalty. Such penalty shall be paid to the comptroller and disposed of in the same manner as other receipts under this local law. Unpaid penalties may be enforced in the same manner as the tax imposed by this local law.

Any person and any officer of a corporation or co-partner filing or causing to be filed any return, certificate, affidavit or statement required or authorized by this local law which is willfully false and any person who shall fail to file a return as required under this local law, and the officers of any corporation which shall so fail, shall be guilty of a misdemeanor, punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment.

The certificate of the comptroller to the effect that a tax has not been paid, that a return has not been filed, or that information has not been supplied pursuant to the provisions of this local law shall be prima facie evidence thereof.

[fol. 64]

§ 10

Refunds.—If within one year from the payment of any tax or penalty the payer thereof shall make application for a refund thereof and the comptroller or the court shall determine that such tax or penalty, or any portion thereof, was erroneously or illegally collected, the comptroller shall refund the amount so determined. For like cause and within the same period a refund may be so made on the initiative of the comptroller. Whenever a refund is made the comptroller shall state his reasons therefor in writing. However, no refund shall be made of a tax or penalty paid pursuant to a determination of the comptroller as provided in section six of this local law unless the comptroller after a hearing as in said section provided or of his own motion, shall have reduced the tax or penalty or it shall have been established in a certiorari proceeding that such determination was erroneous or illegal, in which event a refund shall be made as above provided upon the termination of such proceeding.

An application for a refund made as herein provided shall be deemed an application for a revision of any tax or penalty complained of and the comptroller may receive additional evidence with respect thereto. After making his determination the comptroller shall give notice thereof to the person interested and he shall be entitled to a certiorari order to review such determination, subject to the provisions of section six in respect thereto.

[fol. 65]

§ 11

General Powers of Comptroller.—In the administration of this local law the comptroller shall:

First. Make such reasonable rules and regulations, not inconsistent with law as may be necessary for the exercise of his powers and the performance of his duties under this local law, and prescribe the form of blanks, reports and other records relating to the administration and enforcement of this local law.

Second. Assess, determine, revise, readjust and impose the taxes authorized to be imposed under this local law.

Third. Take testimony and proofs, under oath, with reference to any matter within the line of his official duty under this local law or he may designate any duly authorize an employee to act in his place for that purpose.

Fourth. To request information from the tax commission of the state of New York or the United States collector of internal revenue relative to any person; and to afford information to such tax commission, or such collector of internal revenue relative to any person, any other provision in this local law to the contrary notwithstanding.

§ 12

Administration of Oaths and Compelling Testimony.—The comptroller or his employee duly designated and authorized by the comptroller shall have power to administer oaths and take affidavits in relation to any matter or proceeding in the exercise of the powers and duties of the comptroller under this local law. The comptroller shall [fol. 66] have power to subpoena and require the attendance of witnesses and the production of books, papers and documents pertinent to the investigations and inquiries which he is authorized to conduct under this local law, and to examine them in relation to any matter which he has power to investigate hereunder and to issue commissions for the examination of witnesses who are out of the state or unable to attend before him or excused from attendance.

A justice of the supreme court either in court or at chambers shall have power summarily to enforce by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers and documents called for by the subpoena of the comptroller hereunder.

Any person who shall testify falsely in any material matter pending before the comptroller hereunder shall be guilty of a misdemeanor and punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment.

The officers who serve the comptroller's summons or subpoena hereunder and witnesses attending in response thereto shall be entitled to the same fees as are allowed to officers and witnesses in civil cases in courts of record.

§ 13

Returns to be Secret.—Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for the comptroller or any officer or employee of the department of finance to divulge or make known in any manner, the receipts or any other information relating to the business of a taxpayer contained in any return [fol. 67] required under this local law.

The officers charged with the custody of such returns shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court, except on behalf of the city of New York or of the comptroller, or on behalf of any party to any action or proceeding under the provisions of this local law when the returns or fact shown thereby are directly involved in such action or proceeding, in either of which events, the court may require the production of, and may admit in evidence, so much of said returns or of the fact shown thereby, as are pertinent to the action or proceeding and no more.

Nothing herein shall be construed to prohibit the delivery to a taxpayer or his duly authorized representative of a certified copy of any return filed in connection with his tax, nor to prohibit the publication of statistics so classified as to prevent the identification of particular returns and the items thereof or the inspection by the corporation counsel of the city of New York or other legal representatives of such city of the return of any taxpayer who shall bring action or proceeding to set aside or review the tax based thereon, or against whom an action or proceeding has been instituted or is contemplated for the collection of a tax or penalty. Returns shall be preserved for three years and thereafter until the comptroller orders them to be destroyed.

§ 14

Disposition of Revenues.—All revenues and moneys resulting from the imposition of the taxes imposed by this

local law shall be paid into the treasury of the city of [fol. 68] New York and shall not be credited or deposited in the general fund of the city of New York, but shall be deposited in a separate bank account or accounts, and shall be available and used solely and exclusively for the purpose of relieving the people of the city of New York from the hardships and suffering caused by unemployment, including the repayment of moneys borrowed for such purpose.

§ 15

Application: Construction.—If any provision of this local law, or the application thereof to any person or circumstances, is held invalid, the remainder of this local law, and the application of such provisions to other persons or circumstances, shall not be affected thereby. This local law shall be construed in conformity with chapter eight hundred seventy-three, laws of nineteen hundred and thirty-four as amended by chapter six hundred one of the laws of nineteen hundred and thirty-five, pursuant to which it is enacted.

§ 16

This Local Law Shall Not be Deemed to Repeal or in any way affect local law number twenty-one for nineteen hundred and thirty-four, as amended by local law number two for nineteen hundred and thirty-five, but the aforesaid local laws shall remain in full force and effect.

§ 17

Effective Date.—This local law shall take effect immediately.

[fol. 69] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

[Same title]

STIPULATION AS TO EXHIBITS NOT PRINTED

It is hereby stipulated and agreed by and between the attorneys for the respective parties to this appeal, subject to the approval of the Court, that Contract No. 4 between the City of New York and the New York Municipal

Railway Corporation, dated March 19, 1913, cited in the short-form order of Steuer, J., dated January 14, 1937, be omitted from this printed record on appeal, without prejudice to the rights of either party on this or any appeal to refer to said contract in briefs and upon argument, or to submit the original to the Appellate Court or Courts with the same force and effect as if printed herein, the reason assigned being that said exhibit is voluminous and would tend to clutter up the record.

Dated March 3, 1937.

Paul Windels, Corporation Counsel, Attorney for Defendant-Appellant. George D. Yeomans, Attorney for Plaintiff-Respondent.

So Ordered: F. M.

[fol. 70] IN SUPREME COURT OF NEW YORK

OPINION OF STEUER, J.

(Reported in 97 New York Law Journal 241 on January 15, 1937.)

N. Y. R. T. Corp'n v. City of N. Y.—This motion seeks dismissal of the complaint for failure to state a cause of action. The complaint seeks the recovery of moneys paid under protest, pursuant to Local Laws No. 21 of 1934, and Nos. 2 and 30 of 1935, upon the ground that these statutes are unconstitutional. The first objection to the pleading is to the form of the action. This is at law for money had and received, ordinarily the accepted form for the relief desired (*Ætna Ins. Co. v. The Mayor*, 153 N. Y., 331). The objection is based on section 10 of the act which is headed "Refunds," and provides for application to the comptroller where a tax has been "erroneously or illegally collected" and for certiorari to review his decision. While in a sense the claim here is that the collection was illegal it is not such a claim as is contemplated by the section, and it is not that which would or could be entertained by the comptroller. Consequently the statutory provision lacks application here (*Buder v. First Nat. Bank in St. Louis*, 16 F., 2d, 990).

The plaintiff is a transportation corporation operating a railroad under contract with the defendant which con-

tract is known as Contract No. 4. Plaintiff is subject to the supervision of the Metropolitan Division of the Department of Public Service. By the local laws above enumerated the defendant city, pursuant to the authority vested in it by chapter 815, Laws 1933, and similar acts annually thereafter, imposed a tax of 3 per cent. upon the gross income of persons or corporations subject to the supervision of the said department. The purpose of [fol. 71] the tax was provision for relief for the unemployed and the moneys so collected are provided to be held apart from other city funds.

The complaint seeks the recovery back of the moneys paid on several grounds. The first is that the local laws are unconstitutional in that they impair the obligations of Contract No. 4. The facts alleged to show the impairment are that the contract antedates the local laws. It provides that the revenues derived from the operation of the road be devoted to several purposes in order. Of these the second is taxes and assessments, which is followed by operating expenses, maintenance and depreciation. Then comes several sums payable to plaintiff representing a sum equal to what it was earning on its roads prior to entering into the contract, interest on its contribution to the cost of the road, and other interest payable to it. The claim is that by the imposition of this tax plaintiff's opportunity to receive from the income of the road the sums collectible by it are reduced as the payment of taxes comes ahead of these sums. The contract contains no agreement that taxes in addition to those current at the time of its execution will not be levied. In fact the contrary is expressly indicated. The claim is, therefore, that there is an implied condition that the city will do nothing which may tend to reduce the amount collectible by plaintiff under its contract. A contract with a governing power contains no such implied condition where the act complained of is the legitimate exercise of a governmental function. Assuming the act to be of such a character the city may operate a competing business and it may tax its contractee's business and exempt its own from taxation (*Puget Sound Co. v. Seattle*, 291 U. S., 619). It is further pleaded in this connection that the Enabling [fol. 72] Acts (chap. 815, Laws of 1933 et seq.) give no authority to defendant to tax this plaintiff. The inspira-

tion for this claim rests on nothing in the Enabling Act but on the fact that Contract No. 4 was executed in accordance with the Rapid Transit Act (chap. 4, Laws 1891 as amended), and that pursuant to the direction of that act the revenues receivable by the city are to be used for a purpose specified alike in the act and the contract. It is claimed that the local laws will deprive the city of revenues from the contract because of the sums collected as taxes, and these sums will not be employed in the manner designated in the Rapid Transit Act. It is concluded that the local laws are for that reason in derogation of the Rapid Transit Act, and while it is conceded that the State Legislature might have given the local legislature authority to enact such legislation it is not to be presumed that it did so without an express grant to that effect. The conclusion reached would be sound were it based on a sound hypothesis (*Socony-Vacuum Oil Co., Inc., v. City of New York*, 247 App. Div., 163, holding that the Enabling Act gives no authority to impose a tax repugnant to the established policy of the state). As a matter of theory the local law does not prevent the coming into existence of a balance payable to the defendant city for the purposes of the Rapid Transit Act, and as a matter of fact there is no allegation in the complaint that the effect of the local law has been to prevent such a balance. Furthermore, while this particular tax was not in contemplation when the Rapid Transit Act became law, nothing in that act is in conflict with the conception of there being taxes imposed which would, of necessity, reduce the payments provided to be made to the defendant.

[fol. 73] The tax is next alleged to be unconstitutional on the ground that it takes from the receipts of the plaintiff such a sum that the remainder does not equal a fair return on its investment. This contention was practically abandoned on the argument, and rightfully so, for, "even if the tax should destroy a business it would not be made invalid or require compensation on that ground alone" (*Alaska Fish Co. v. Smith*, 255 U. S., 44, 48).

The next contention is founded on these two facts: The tax is a tax on utilities and the proceeds are segregated and devoted to the relief of unemployed persons. From these facts it is argued that this measure is not a tax but an exaction from one group for the benefit of the other and,

not being regulatory, is without authority. A tax upon utilities as a group is a valid classification (*New York Steam Corp'n v. City of New York*, 268 N. Y., 137). It is true that in the absence of some connection between the group taxed and the beneficiaries thereof, if such beneficiaries there be, renders an impost not a tax but an illegal exaction (*United States v. Butler*, 297 U. S., 1). Here there is no group or class that are the beneficiaries. The unemployed are not connected by ties of origin, location or occupation. They are no more a class than are the aged, the insane or the sick. Their relief has been held beyond dispute to be a duty of the state. "If the moral and physical fibre of its manhood and its womanhood is not a state concern, the question is, what is?" (*Adler v. Deegan*, 251 N. Y., 467, 484). The argument that this is an exaction for the benefit of a class is untenable.

Additional facts are alleged from which conclusions are drawn as to the validity of the local laws. Certain of [fol. 74] these claims are set forth in various forms, but analysis reduces them to the following: The tax being on gross income is improper because it is ruinous and because it creates inequality; the tax places a greater burden on one group of taxpayers, the utilities, than on others; the tax is improper in that it is imposed upon some engaged in transportation and not others; that the method of defining utilities in the local law is unfair thereby making an improper classification; and, particularizing, the plaintiff differs from the other utilities in that it is prevented by contract from increasing its rates and cannot pass the effect of the tax on to its consumers.

Investigating these in order it will be seen from the foregoing that the weight of the burden of the tax does not affect its validity. The point of inequality is factually supported. Plaintiff does business on a shorter margin of profit than many of the other persons subject to the tax. The consequent result is that the percentage of plaintiff's profit taken by the tax exceeds that taken from the others in the same group. It is shown that this difference amounts in at least one instance to 300 per cent. It is further alleged that this discrepancy comes about not through different methods of management or the like, but because of the essential differences in the nature of the business conducted by the two utilities. Exact equality is not required of a

tax (Clark v. Titusville, 184 U. S., 329). Nor is there anything inherently improper in a tax on gross receipts (Metropolis Theatre Co. v. Chicago, 228 U. S., 61). Where, however, gross inequalities result from that method of taxation, and where this inequality is effectuated by the definition of the class to be taxed, the tax must fail (Stewart Dry Goods Co. v. Lewis, 294 U. S., 550). On this point [fol. 75] the allegations of the complaint are sufficient. It may be noted that this question was not raised in the previous cases where the validity of the local laws was under inquiry.

The claim of unconstitutionality because of the unusual burden placed by the tax on utilities has been disposed unfavorably to the plaintiff's position (N. Y. Steam Corp'n v. City, supra), as has the contention that others engaged in similar businesses are not taxed (So. Blvd. RR. v. City of N. Y., C. C. A., 2nd Circuit, 1936, not yet officially reported). To the last contention, which refers to plaintiff's inability to pass the tax on to its customers, in which its position differs from the other utilities, it is a sufficient answer that this is an accident of trade whose consequence must be accepted as inherent in our form of government (see Fox v. Standard Oil Co. of N. Y., 294 U. S., 87, 102).

The motion is denied without prejudice to a motion by defendant to strike out such portions of the complaint as are irrelevant to the one issue which is valid. Order signed.

[fol. 76] IN SUPREME COURT OF NEW YORK
WAIVER OF CERTIFICATION

It is hereby stipulated that the foregoing are correct copies of the notice of appeal to the Appellate Division, the order appealed from, the opinion of Steuer, J., and all the papers on which said order and opinion are founded, all of which are now on file in the office of the Clerk of the County of New York; and certification thereof pursuant to Section 170 of the Civil Practice Act or otherwise is hereby waived.

Dated, New York, March 11th, 1937.

Paul Windels, Corporation Counsel, Attorney for
Defendant-Appellant. George D. Yeomans, At-
torney for Plaintiff-Respondent.

[fol. 77] IN SUPREME COURT OF NEW YORK, COUNTY OF NEW
YORK

[Title omitted]

NOTICE OF APPEAL TO THE COURT OF APPEALS

SIRS:

Please take notice that the defendant pursuant to leave granted by an order of the Appellate Division of the Supreme Court, First Department, dated the first day of June, 1937, hereby appeals to the Court of Appeals from the order of the said Appellate Division of the Supreme Court, First Department, dated the 21st day of May, 1937, and entered in the office of the Clerk of said Appellate Division on or about the same day which order affirmed the order entered herein in the office of the Clerk of the County of New York on or about the 15th day of January, 1937, denying defendant's motion to dismiss the complaint herein and defendant appeals from each and every part of said [fol. 78] Appellate Division order as well as from the whole thereof.

Dated, June 1, 1937.

Yours, etc., Paul Windels, Corporation Counsel, Attorney for Defendant, Office and P. O. Address, Municipal Building, Borough of Manhattan, City of New York.

To George D. Yeomans, Esq., Attorney for Plaintiff, 385 Flatbush Avenue Ext., Borough of Brooklyn, New York City.

To Hon. Albert Marinelli, Clerk of New York County.

[fol. 79] IN SUPREME COURT OF NEW YORK, APPELLATE
DIVISION

[Title omitted]

ORDER GRANTING LEAVE TO APPEAL TO THE COURT OF
APPEALS—June 1, 1937

The above named defendant having moved for leave to appeal to the Court of Appeals from the order of this Court entered herein on the 21st day of May, 1937,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavit of Paxton Blair in support of said motion, and after hearing Mr. Paul Windels for the motion, and the respondent appearing but not opposing,

[fol. 80] It is hereby ordered that the said motion be and the same hereby is granted, and this Court hereby certifies that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals, as follows:

Does the complaint herein state facts sufficient to constitute a cause of action?

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

3977

BROOKLYN AND QUEENS TRANSIT CORPORATION, Respt.,

VS.

THE CITY OF NEW YORK, Applt.

ORDER OF AFFIRMANCE—May 21, 1937

An appeal having been taken to this Court by the defendant [fol. 81] from an order of the Supreme Court, New York County, entered on or about the 15th day of January, 1937, denying defendant's motion for judgment dismissing the complaint, and said appeal having been argued by Mr. Sol Charles Levine of counsel for the appellant, and by Mr. Harold L. Warner of counsel for the respondent; and due deliberation having been had thereon,

It is hereby ordered that the order so appealed from be and the same is hereby affirmed with \$20 costs and disbursements to the respondent, with leave to the defendant to answer within twenty days after service of a copy of this order with notice of entry thereof upon payment of said costs. Two of the Justices dissenting and voting to reverse and grant the motion.

IN SUPREME COURT OF NEW YORK

AFFIDAVIT OF NO OPINION

STATE OF NEW YORK,

County of New York, ss:

John A. Leddy, being duly sworn, says that he is Acting Chief Clerk in the office of the Corporation Counsel of The City of New York; that no written opinion or memorandum was handed down by the Appellate Division in deciding this appeal.

John A. Leddy.

Sworn to before me this 3rd day of June, 1937. Hugh H. Senior, Notary Public, Bronx County, Certificate filed in New York County.

[fol. 82]

IN SUPREME COURT OF NEW YORK

WAIVER OF CERTIFICATION

It is hereby stipulated that the foregoing are correct copies of the notice of appeal to the Court of Appeals, the order granting leave to appeal to the Court of Appeals, the order of affirmance and all the papers upon which said order of affirmance is founded, all of which are now on file in the office of the Clerk of the County of New York; and certification thereof pursuant to Section 170 and Section 616 of the Civil Practice Act or otherwise is hereby waived.

Dated, New York, June 3rd, 1937.

George D. Yeomans, Attorney for Plaintiff-Respondent. Paul Windels, Corporation Counsel, Attorney for Defendant-Appellant.

[fol. 83]

IN COURT OF APPEALS OF NEW YORK

REMITTITUR—July 13, 1937

[fol. 84]

BROOKLYN AND QUEENS TRANSIT CORPORATION,
Respondent,

ag'st

THE CITY OF NEW YORK, Appellant.

Be It Remembered, That on the 4th day of June, in the year of our Lord one thousand nine hundred and

thirty-seven, The City of New York, the appellant in this cause, came here unto the Court of Appeals, by Paul Windels, its attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Brooklyn and Queens Transit Corporation, the respondent in said cause, afterwards appeared in said Court of Appeals by George D. Yeomans, its attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. Paxton Blair, of counsel for the appellant, and by Mr. Harold L. Warner, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the orders herein be and the same hereby are reversed and complaint dismissed, with costs in all courts and question certified answered in the negative, on authority of New York Rapid Transit Corporation vs. The City of New York, decided herewith.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, there to be proceeded upon according to law.

[fol. 85] Therefore, it is considered that the said orders be reversed and complaint dismissed, with costs in all courts and question certified answered in the negative &c., &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, First Judicial Department, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS

Clerk's Office

Albany, July 13, 1937.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal.)

[fol. 86] IN SUPREME COURT OF NEW YORK, APPELLATE
DIVISION

BROOKLYN AND QUEENS TRANSIT CORPORATION,
Plaintiff-Respondent,

against

THE CITY OF NEW YORK, Defendant-Appellant.

ORDER ON REMITTITUR—August 6, 1937

The defendant-appellant, pursuant to leave granted by an order of this Court dated the 1st day of June, 1937, having appealed to the Court of Appeals from the order of this Court dated the 21st day of May, 1937 and entered in the office of the Clerk of this Court on or about the same day, which order affirmed with \$20. costs and disbursements the order of the Special Term entered herein in the office of the Clerk of the County of New York on or about the 15th day of January, 1937 denying defendant-appellant's motion for judgment dismissing the complaint herein, and this Court having certified to the said Court of Appeals the following question, to wit:

"Does the complaint herein state facts sufficient to constitute a cause of action?"

And the said appeal having been duly argued at the Court of Appeals, and that Court, in an order dated the [fol. 87] 13th day of July, 1937 having ordered and adjudged that the order of this Court so appealed from and the order of the Special Term aforesaid be reversed and the complaint dismissed with costs in all courts and the

question certified answered in the negative, and having further ordered that the record and proceedings in said Court of Appeals be remitted to this Court, there to be proceeded upon according to law,

Now, upon reading and filing the remittitur from the said Court of Appeals and on motion on Paul Windels, Corporation Counsel, attorney for defendant-appellant, it is

Ordered that the order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this Court.

[fol. 87½]. Please take notice, that an Order, of which the within is a copy, was this day duly entered in the office of the Clerk of the Appellate Division of the Supreme Court in and for the First Judicial Department on the 6th day of August 1937 and a certified copy of said order was duly filed in the office of the Clerk of the County of New York on the 9th day of August, 1937.

Yours, etc., Paul Windels, Corporation Counsel, Attorney for Deft.-Applnt., Municipal Building, Borough of Manhattan, New York City.

To George D. Yeomans, Esq., Attorney for pl., 385 Flatbush Ave. Ext., Bklyn., N. Y.

Copy received Aug. 11, 1937. George D. Yeomans, Attorney for —.

[fol. 87a] IN SUPREME COURT OF NEW YORK, NEW YORK COUNTY

BROOKLYN AND QUEENS TRANSIT CORPORATION,
Plaintiff-Respondent,

against

THE CITY OF NEW YORK, Defendant-Appellant

JUDGMENT ON REMITTITUR

The defendant-appellant having appealed to the Court of Appeals from the order of the Appellate Division, First Department, dated the 21st day of May, 1937, and entered

in the office of the Clerk of said Appellate Division, on or about the same day, which order affirmed with \$20.00 costs and disbursements the order of the Special Term entered herein in the office of the Clerk of the County of New York on or about the 15th day of January, 1937, denying defendant-appellant's motion for judgment dismissing the complaint herein, and the said appeal having been duly argued at the Court of Appeals and that Court in an order dated the 13th day of July, 1937, having ordered and adjudged that the order of the Appellate Division, First Department so appealed from be reversed and the complaint dismissed with costs in all Courts, upon the ground that the complaint does not state facts sufficient to constitute a cause of action, and having remitted the record and proceedings in said Court of Appeals to the Appellate Division, First Department, there to be proceeded upon according to law, and an order having been duly filed and entered in the office of the Clerk of the said Appellate Division on or about the 6th day of August, 1937, making the order and judgment [fol. 87b] of the Court of Appeals the order and judgment of the Appellate Division, First Department, and a certified copy of said order having been duly filed and entered in the office of the Clerk of the County of New York on the 9th day of August, 1937, and the costs of the defendant-appellant having been duly taxed at the sum of \$289.03

Now, on motion of Paul Windels, Corporation Counsel, attorney for defendant-appellant it is

Adjudged that the complaint be and the same hereby is dismissed upon the ground that the complaint does not state facts sufficient to constitute a cause of action; and it is further

Adjudged that the defendant-appellant, The City of New York (Municipal Building, New York City), recover of the plaintiff-respondent, Brooklyn and Queens Transit Corporation (385 Flatbush Avenue Extension, Borough of Brooklyn, New York City) the sum of \$289.03 costs as taxed, and that said defendant-appellant have execution therefor.

Dated, August 9, 1937.

Albert Marinelli, Clerk.

[fol. 87c] Please take notice that a Judgment of which the within is a copy, was this day duly entered and filed in the office of the Clerk of the County of New York.

New York, August 9, 1937.

Yours, etc., Paul Windels, Corporation Counsel, Municipal Building, Borough of Manhattan, New York City.

To George D. Yeomans, Esq., Attorney for Plaintiff, 385 Flatbush Ave. Ext., Bklyn., N. Y.

Copy received Aug. 11, 1937. George D. Yeomans, Attorney for —.

[fol. 88] IN SUPREME COURT OF NEW YORK, NEW YORK COUNTY

[Title omitted]

ORDER RESETTING JUDGMENT—August 11, 1937

Upon the annexed approval as to form and waiver of notice of settlement and on motion of Paul Windels, Corporation Counsel, attorney for defendant-appellant, it is

Ordered that the judgment entered herein in the office of the Clerk of the County of New York on the 9th day of August, 1937, be and the same hereby is resettled so as to read as follows:

“SUPREME COURT, NEW YORK COUNTY

BROOKLYN AND QUEENS TRANSIT CORPORATION,
Plaintiff-Respondent,

against

THE CITY OF NEW YORK, Defendant-Appellant

The defendant-appellant having appealed to the Court of Appeals from the order of the Appellate Division, First Department, dated the 21st day of May, 1937, and entered in the office of the Clerk of said Appellate Division, on or about the same day, which order affirmed with \$20.00 costs and disbursements the order of the Special Term entered herein in the office of the Clerk of the County of New York on or about the 15th day of January, 1937, denying defend-
[fol. 89] ant-appellant's motion for judgment dismissing

the complaint, and the said appeal having been duly argued at the Court of Appeals and that Court in an order dated the 13th day of July, 1937, having ordered and adjudged that the said order of the Appellate Division, First Department, and the said order of the Special Term be reversed and the complaint dismissed with costs in all Courts, upon the ground that the complaint does not state facts sufficient to constitute a cause of action, and having remitted the record and proceedings in said Court of Appeals to the Appellate Division, First Department, there to be proceeded upon according to law, and an order having been duly filed and entered in the office of the Clerk of the said Appellate Division on or about the 6th day of August, 1937, making the order and judgment of the Court of Appeals the order and judgment of the Appellate Division, First Department, and a certified copy of said order having been duly filed and entered in the office of the Clerk of the County of New York on the 9th day of August, 1937, and the costs of the defendant-appellant having been duly taxed at the sum of \$289.03,

Now, on motion of Paul Windels, Corporation Counsel, attorney for defendant-appellant it is

Adjudged that the said order of the Appellate Division, First Department, and the said order of the Special Term be and the same hereby are reversed; and it is further

Adjudged that the complaint be and the same hereby is dismissed upon the ground that the complaint does not state facts sufficient to constitute a cause of action; and it is further

Adjudged that the defendant-appellant, The City of New York (Municipal Building, New York City), recover of the plaintiff-respondent, Brooklyn and Queens Transit Corporation (385 Flatbush Avenue Extension, Borough of Brooklyn, New York City) the sum of \$289.03 costs as taxed, and that said defendant-appellant have execution therefor.

Dated, August 9th, 1937.

Albert Marinelli, Clerk."

Enter.

C. P., J. S. C.

[fol. 90] The foregoing order is hereby approved as to form and notice of settlement thereof waived.

Dated, August 11, 1937.

George D. Yeomans, Attorney for Plaintiff-Respondent.

[fol. 90½] Please take notice that an Order, of which the within is a copy, was this day duly entered and filed in the office of the Clerk of the County of New York.

New York, Aug. 12, 1937.

Yours, etc., Paul Windels, Corporation Counsel, Attorney for the Defendant, Municipal Building, Borough of Manhattan, New York City.

To George D. Yeomans, Esq., Attorney for Plaintiff, 385 Flatbush Ave., Ext., Bklyn.

Copy received Aug. 16, 1937. George D. Yeomans, Attorney for —.

[fol. 91] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL

The petition of Brooklyn and Queens Transit Corporation, the appellant in the above entitled cause, for an appeal in the above entitled cause to the Supreme Court of the United States from the judgment of the Supreme Court of the State of New York, having been filed with the Clerk of this Court and presented herein, accompanied by assignments of error, and statement of jurisdiction under Rule 12 of the Rules of the United States Supreme Court, all as provided by Rule 46 of said Rules, together with a prayer for reversal, and the record in this cause having been considered, and it appearing from said petition and the record in the above entitled cause that there was drawn in question the validity of Local Law No. 21 of 1934, as amended, and Local Law No. 30 of 1935, of the City of New York on the ground that said Local Laws deny to the appellant the equal protection of the law and deprive the appellant of its property without due process of law, in violation of [fol. 92] the Fourteenth Amendment to the Constitution of the United States, and that the decree of the Court was in favor of the validity of said Local Laws, it is hereby

Ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of New York, dated the 9th day of August, 1937, as resettled by order of said

Supreme Court of the State of New York, dated August 11, 1937, as prayed in said petition, and that the Clerk of the Supreme Court of the State of New York, to which court the record herein has been remitted, shall, within forty days from this date, make and transmit to the Supreme Court of the United States, under his hand and the seal of said Court, a true copy of the material parts of the record herein, which shall be designated by præcipe or stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

It is further Ordered that the said appellant shall give a good and sufficient bond in the sum of Five Hundred Dollars, and that said appellant shall prosecute said appeal to effect and answer all costs if it fails to make its plea good.

Dated: August 24, 1937.

Frederick E. Crane, Chief Judge of the Court of Appeals of the State of New York.

[fol. 93] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL

To the Chief Judge of the Court of Appeals of the State of New York:

Your Petitioner, Brooklyn and Queens Transit Corporation, appellant in the above-entitled cause, respectfully shows:

This action was brought in the Supreme Court of the State of New York, New York County, to recover the sum of \$756,879.50, together with interest thereon, which sum had been paid by your petitioner to the defendant-appellee, The City of New York, involuntarily, under duress and compulsion, and under written protest, as taxes under certain Local Laws of the City of New York, known as Local Laws No. 21 of 1934, as amended, and No. 30 of 1935, which Local Laws were purportedly enacted by the Municipal Assembly of the City of New York under and pursuant to the authority granted, respectively, by Acts of the Legis-

lature of the State of New York known as Chapter 873 of the Laws of 1934 and Chapter 601 of the Laws of 1935, the State Legislature having by said Acts delegated to The City of New York the power during certain specified periods to adopt and amend local laws imposing any tax or [fol. 94] taxes which the State Legislature itself could have imposed for the purpose of raising money for unemployment relief.

The amended complaint herein (hereinafter called the complaint) alleges that the so-called taxes thus sought to be recovered by your petitioner were illegally collected and received by the appellee because the said Local Laws are, and each of them is, unconstitutional, null and void, being in violation of Section 10 of Article 1 of, and of Section 1 of the Fourteenth Amendment to, the Constitution of the United States.

The defendant-appellee, The City of New York, made a motion at Special Term, Part III, of the said Supreme Court, New York County, for an order dismissing the complaint and directing judgment for said defendant on the ground that the complaint did not state facts sufficient to constitute a cause of action, and on the further ground that the said Court had no jurisdiction of the action. Said motion was denied by the Justice of said Supreme Court before whom it was argued upon the grounds set forth by him in his opinion in the companion case of New York Rapid Transit Corporation v. The City of New York, decided simultaneously therewith, in which opinion (the amended complaint in which contained substantially the same allegations as in the above-entitled cause) he held that the Court had jurisdiction of the action and that the allegations of the complaint sufficiently showed that the Local Laws in question deny to your petitioner the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States, it appearing from the complaint that a tax measured by a percentage of gross income and imposed upon all "utilities", as defined in said Local Laws, resulted in taking a far larger [fol. 95] proportion of the net income of your petitioner and other street railroad companies for the special purpose of unemployment relief, than of the net income of other utilities included in the taxed class, the petitioner and other street railroad companies being compelled to

do business on a far lower margin of profit than other utilities within the taxed class not because of inferior management but because of essential differences in the character of the respective businesses. Pursuant to said opinion an order was made by said Supreme Court of the State of New York, at Special Term, on January 14, 1937, denying said motion.

From said order the defendant-appellee took an appeal to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department. That Court, by order made and entered on May 21, 1937, affirmed said first-mentioned order without opinion, and thereafter, on motion of said defendant-appellee, and by order made and entered on June 1, 1937, the said Appellate Division of the Supreme Court of New York, First Judicial Department, granted said defendant-appellee leave to appeal to the Court of Appeals of the State of New York, and certified to that Court the question: "Does the complaint herein state facts sufficient to constitute a cause of action". Said appeal was argued in said Court of Appeals on the 10th day of June, 1937, and on July 13, 1937, said Court of Appeals by its remittitur of said date ordered and adjudged that the said orders of the Special Term and of the Appellate Division of the Supreme Court of the State of New York be reversed and the complaint dismissed with costs in all courts, and it answered the question certified in the negative. It further ordered by its said remittitur that the record and proceedings in said Court of Appeals be remitted to said Appellate Division of the Supreme Court, there to be proceeded upon according to law.

[fol. 96] Thereafter, on or about the 6th day of August, 1937, the said Appellate Division of the Supreme Court of the State of New York made and entered an order directing that the order and judgment of the Court of Appeals be made its order and judgment, and thereafter, on the 9th day of August, 1937, a final judgment was entered in the office of the Clerk of the Supreme Court, New York County, dismissing the complaint herein upon the ground that it failed to state facts sufficient to constitute a cause of action. Thereafter, on motion of the appellee, said judgment was resettled, to include certain formal omissions therefrom but in no other manner, by order of said

Supreme Court made on August 11, 1937, and entered on August 12, 1937.

The decision of the Court of Appeals of the State of New York was expressly based upon the authority of its decision and opinion in said companion case of New York Rapid Transit Corporation v. The City of New York, decided simultaneously therewith. Said opinion was written by Judge Finch and concurred in by five other Judges, and it shows that said Court of Appeals determined that the complaint in the above-entitled action stated a cause of action for recovery of the taxes in question if the Local Laws in question were unconstitutional but that the said Local Laws were valid as applied to your petitioner, notwithstanding the various grounds, as stated in the complaint, upon which your petitioner contended that they violate the Constitution of the United States.

The Court of Appeals of the State of New York is the highest Court of said State in which a decision in this action can be had.

The question as to whether or not the complaint in this action states a cause of action depends upon whether or [fol. 97] not the aforesaid Local Laws are, as alleged in the complaint, repugnant to the Constitution of the United States, and the said Court of Appeals decided in favor of their validity notwithstanding your petitioner's contention that said Local Laws violate Section 1 of the Fourteenth Amendment to said Constitution.

In accordance, therefore, with Sec. 237(a) of the Judicial Code, and in accordance with the Rules of the Supreme Court of the United States, your petitioner respectfully shows this Court that the cause is one in which, under the legislation in force when the Act of January 31, 1928 was passed, to wit, under Sec. 237(a) of the Judicial Code, a review could be had in the Supreme Court of the United States under a writ of error, as a matter of right.

The errors upon which your petitioner claims to be entitled to an appeal are more fully set forth in the assignment of errors filed herewith pursuant to Rules 9 and 46 of the Rules of the Supreme Court of the United States; and there is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States as provided by Rules 12 and 46 of said Rules.

Wherefore, your petitioner prays for the allowance of an appeal from the Supreme Court of the State of New York, which has possession of the record of all proceedings herein, and wherein was entered said final judgment dismissing the complaint herein, to the Supreme Court of the United States, in order that the decision of the said Court of Appeals and the final judgment of the Supreme Court of the State of New York (as resettled by said order of August 11, 1937) entered pursuant thereto may be examined and reversed, and also prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the State of New York, under his hand and the seal of said Court may be sent to the Supreme Court of the United States as provided by law, and that an order be made touching the security to be required of the petitioner, and that the bond tendered by the petitioner be approved.

Dated August 24, 1937.

Brooklyn and Queens Transit Corporation, Appellant by Paul D. Miller, George D. Yeomans, Its Attorneys, Office and Post Office Address: 385 Flatbush Avenue Extension, Borough of Brooklyn, City and State of New York.

[fol. 99] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

° ASSIGNMENT OF ERRORS

The appellant, above named, assigns the following errors in the record of proceedings in this cause:

The Court of Appeals of the State of New York erred:

1. In holding that Local Law No. 21 of 1934, as amended, and Local Law No. 30 of 1935, of the City of New York, do not deny to appellant the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

2. In refusing to hold, in accordance with the contention made by appellant, that the said Local Laws violate [fol. 100] the equal protection clause of the Fourteenth

Amendment to the Constitution of the United States in that the tax purported to be imposed by said laws upon appellant and other utility corporations is one to raise money, not for the general support of government, but for a special and limited purpose, no more related to those taxed by said laws than to others, and in that no such heavy tax for said purpose is imposed by any law of the City or State of New York upon corporations other than utility corporations, although there is no difference between the latter and other corporations which bears any relation to the stated object for which the tax is imposed and therefore no reasonable basis for a classification whereby utility corporations are taxed far more heavily for said purpose than are corporations engaged in other forms of business.

3. In refusing to hold, in accordance with the contention made by appellant, that said Local Laws violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States in that they involve palpably hostile discrimination against the appellant and other utility corporations, it appearing from the amended complaint that ordinary business corporations are taxed, for the purpose of raising money for unemployment relief, at the rate of only $1/10$ of 1% of their gross receipts from business conducted within the City of New York in excess of \$15,000.00, while utilities, as defined in said Local Laws, are taxed thereunder for that purpose at the rate of 3% of their gross income from all sources, without any deduction, so that the latter, including appellant, are taxed on their gross incomes at a rate more than 3000% in excess of that at which ordinary business corporations are taxed for a purpose no more related to the one group than to the other.

[fol. 101] 4. In refusing to hold, in accordance with the contention made by appellant, that said Local Laws violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States in that there is no reasonable basis for taxing appellant and other street railroad corporations for the purpose of unemployment relief at a rate more than thirty times as high as the rate at which ordinary business corporations are taxed for that purpose, even if there be a reasonable basis for so taxing

utility corporations other than street railroad corporations, it appearing from the amended complaint that appellant and other corporations operating street railroads within the City of New York do not have the protection against competition or other advantages which other utility corporations have and which were cited by the Court of Appeals in *New York Steam Corporation vs. City of New York*, 268 N. Y. 137, as affording a reasonable basis for the imposition of a tax on utilities not imposed on ordinary business corporations, since appellant and other corporations engaged in the business of operating street railroads in the City of New York do meet with serious competition from the construction and operation of street railroads by the appellee itself without the necessity of obtaining from the Transit Commission a Certificate of Convenience and Necessity therefor and without any supervision or control by either division of the Department of Public Service and since also appellant does not have the chief advantage enjoyed by other utilities of always being assured a fair return on its capital investment, being limited to a fixed rate of fare by contract with the appellee itself from which appellant can obtain no release and of which the appellee had knowledge at the time when said Local Laws, arbitrarily classifying street railroad corporations with other utilities, were adopted.

[fol. 102] 5. In refusing to hold, in accordance with the contention made by appellant, that said Local Laws violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States in that, as alleged in the amended complaint, the tax therein provided for is measured by a percentage of gross income and applied to a group of corporations, the respective businesses of which are essentially different in character, yielding widely differing ratios of profit, the result being that gross inequalities are produced in the distribution of the tax burden, appellant and all other street railroad corporations being taxed by said Local Laws for the purpose of unemployment relief far more heavily upon their net incomes than other utilities within the taxed class, their operating and maintenance expenses being far higher, and their net income far lower in proportion to gross income, than those of such other utilities, and there being no reasonable

basis for requiring a street railroad corporation to contribute a greater percentage of its net income for relief of unemployment than is required of utilities within the taxed class other than street railroad corporations.

6. In holding that said Local Laws do not deprive appellant of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

7. In refusing to hold, in accordance with the contention made by appellant, that said Local Laws deprive appellant of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, in that the money exactions levied upon appellant by said Local Laws are not for the general support of the government and hence are not taxes, but an expropriation of money from one group for the benefit of another, which such expropriation cannot be sustained as part of any plan of regulation since, under the allegations [fol. 103] of the amended complaint, utilities have no special relation to or responsibility for the situation which the proceeds of the exactions are designed to alleviate and do not receive any special benefit from the money expended therefor.

Wherefore, on account of the errors hereinabove assigned, appellant prays that said judgment of the Supreme Court of the State of New York, dated August 9, 1937, as resettled by order of said court made on August 11, 1937, and entered on August 12, 1937, in the above entitled cause, be reversed, and judgment entered in favor of appellant.

Dated: August 24, 1937.

Brooklyn and Queens Transit Corporation, Appellant, by Paul D. Miller, George D. Yeomans, Its Attorneys, Office and Post Office Address: 385 Flatbush Avenue Extension, Borough of Brooklyn, City & State of New York.

[fol. 104] Citation, in usual form, showing service on Paul Windels, omitted in printing.

[fols. 105-109] Bond on Appeal for \$500.00, approved, omitted in printing.

[fol. 110] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD

It is hereby stipulated and agreed by and between counsel for the respective parties hereto, that the following are the only necessary papers in this action to be included in the transcript of the record to be certified and filed with the Clerk of the Supreme Court of the United States:

1. The entire record in the Court of Appeals
2. Remittitur of the Court of Appeals, dated July 13, 1937
3. Order of the Appellate Division of the Supreme Court of the State of New York on remittitur, dated August 6, 1937
4. Judgment of the Supreme Court of the State of New York on remittitur, dated August 9, 1937
5. Order of the Supreme Court of the State of New York, dated August 11, 1937, resetting said judgment
- [fol. 111] 6. Petition for allowance of appeal.
7. Assignment of errors
8. Order allowing appeal
9. Bond on appeal
10. Statement under Rule 12 of Rules of United States Supreme Court
11. Proof of service of petition for appeal, assignment of errors, statement under Rule 12 and order allowing appeal, together with a statement calling appellee's attention to Par. 3 of Rule 12
12. Citation on appeal, with proof of service
13. This stipulation.

It is further stipulated and agreed that this stipulation supersede and replace the stipulation of the parties hereto as to the transcript of record, dated August 24, 1937 heretofore filed with the Clerk of the Supreme Court of the State of New York in and for the County of New York.

Dated September 13, 1937.

George D. Yeomans, Paul D. Miller, Attorneys for Appellant. Paul Windels, (P.B.), Attorneys for Appellee.

[fol. 112] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 113] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION
AS TO PRINTING RECORD—Filed September 18, 1937

Comes Now the appellant, pursuant to Paragraph 9 of Rule 13 of the Rules of this Court, and adopts its assignment of errors as its statement of points to be relied upon, and represents that the whole of the record, as filed, is necessary for the consideration of said points.

Dated September 14, 1937.

George D. Yeomans, Harold L. Warner, Henry Root Stern, Paul D. Miller, Attorneys for Appellant.

Service of copy of the foregoing is acknowledged this 14th day of September, 1937.

Paul Windels, Attorney for Appellee, Municipal Building, Borough of Manhattan, New York City, N. Y.

A copy of the within paper has this day been received at the office of the corporation counsel, Aug. 26, 1937. Paul Windels, Corporation Counsel.

[fol. 114] [File endorsement omitted.]

Endorsed on cover: File No. 41,917. New York Supreme Court. Term No. 436. Brooklyn and Queens Transit Corporation, appellant, vs. The City of New York. Filed September 18, 1937. Term No. 436, O. T., 1937.

No. 436

BROOKLYN & QUEENS TRANSIT CORPORATION

vs.

THE CITY OF NEW YORK

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

PAUL D. MYER,
GEORGE D. YONKINS,
Counsel for Appellant

INDEX.

SUBJECT INDEX.

	Page
Statement as to jurisdiction.....	1
Statutory basis of the jurisdiction.....	1
State statutes the validity of which is involved.....	1
Date of the judgment sought to be reviewed and date of the application for appeal.....	3
Nature of the case and rulings below.....	3
Record in possession of Supreme Court of the State of New York.....	3
Cases believed to sustain the jurisdiction.....	9
The questions sought to be reviewed herein have not been foreclosed by prior decisions of the Supreme Court of the United States.....	
Exhibit "A"—Opinion of the Court of Appeals of the State of New York.....	14

TABLE OF CASES CITED.

<i>Brooklyn Bus Corp. v. City of New York</i> , 274 N. Y. 140	
<i>Brooklyn & Queens Transit Corp. v. City of New York</i> , 275 N. Y. 258, 275 N. Y. Memoranda 2.....	
<i>Chamberlin v. Andrews, etc.</i> , 299 U. S. 515.....	9
<i>Chicago, R. I. & Pac. Ry. v. Perry</i> , 259 U. S. 548.....	9
<i>Colgate v. Harvey</i> , 296 U. S. 404.....	11
<i>Continental Ins. Co. v. Smrha</i> , 131 Nebr. 791; 270 N. W. 122.....	12
<i>Edge v. Robertson</i> , 112 U. S. 580.....	13
<i>Home Ins. Co. v. Dick</i> , 281 U. S. 397.....	9
<i>J. W. Perry Co. v. Norfolk</i> , 220 U. S. 472.....	
<i>Louisiana v. Merchants' Insurance Co.</i> , 12 La. An. 802	12
<i>Lowry v. City of Clarksdale</i> , 154 Miss. 155, 122 So. 195	12
<i>Merchants Refrigerating Co. v. Taylor</i> , 275 N. Y. 113	11
<i>Nashville, etc. Ry. v. White</i> , 278 U. S. 456.....	9
<i>Nor. Car. R. R. Co. v. Zachary</i> , 232 U. S. 248.....	9
<i>Puget Sound Power & Light Co. v. Seattle</i> , 291 U. S. 619.....	

	Page
<i>Rickert Rice Mills v. Fontenot</i> , 297 U. S. 110.....	13
<i>Royster Guano Co. v. Virginia</i> , 253 U. S. 412.....	12
<i>Senior v. Braden</i> , 295 U. S. 422.....	9
<i>Stebbins v. Riley</i> , 268 U. S. 137.....	
<i>Stewart Dry Goods Co. v. Lewis</i> , 294 U. S. 550.....	10
<i>United States v. Butler</i> , 297 U. S. 1.....	12, 13
<i>United States v. La Franca</i> , 282 U. S. 568.....	13
<i>Valentine v. Great Atlantic & Pacific Tea Co.</i> , 299 U. S. 32.....	10

STATUTES CITED.

Constitution of the United States, Article 1, Section 10 14th Amendment..	3 3, 5
Judicial Code, Section 237a, as amended by the Act of February 13, 1925, (28 U. S. C. 344a).....	1
Laws of the State of New York of 1934, Chapter 873	2
Laws of the State of New York of 1935, Chapter 601	2
Local Laws of the City of New York of 1934, Local Law No. 21, as amended by Local Law No. 2 of 1935, and Local Law No. 30 of 1935.....	2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 436

BROOKLYN & QUEENS TRANSIT CORPORATION,
Appellant,

vs.

THE CITY OF NEW YORK.

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF
NEW YORK

STATEMENT OF JURISDICTION.

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, appellant submits herewith its statement showing the basis of the jurisdiction of said Court to entertain the appeal in the above entitled cause:

1. The appeal is authorized by Section 237(a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C., Title 28, Sec. 344(a)).

2. The statutes, the validity of which is involved, are Local Laws of the City of New York known as Local Law No. 21 of 1934, as amended by Local Law No. 2 of 1935 (set forth in full as Exhibit C to the amended complaint), and Local Law No. 30 of 1935 (set forth in full as Exhibit D to the amended complaint). These Local Laws were par-

portedly enacted by the Municipal Assembly of the City of New York under authority granted, respectively, by Acts of the Legislature of the State of New York known as Chapter 873 of the Laws of 1934 (set forth in full as Exhibit A to the amended complaint) and Chapter 601 of the Laws of 1935 (set forth in full as Exhibit B to the amended complaint), which Acts, together, during the period from August 18, 1934, to July 1, 1936, empowered the City of New York to adopt and amend local laws imposing any tax or taxes which said Legislature itself could impose to relieve the people of said City from the hardships and suffering caused by unemployment.

Local Law No. 21 of 1934, as amended by Local Law No. 2 of 1935, purports to impose upon every utility (as therein defined) doing business in the City of New York and subject to the supervision of either division of the Department of Public Service, an excise tax for the privilege of exercising its franchise or franchises, or of holding property, or of doing business in the City of New York, during the calendar year 1935, or any part thereof, equal to three per centum (3%) of its gross income for the calendar year 1935. It is entitled "A Local Law to relieve the people of the city of New York from the hardships and suffering caused by unemployment and the effects thereof on the public health and welfare, by imposing an excise tax on the gross income of every person doing business within such city and subject to supervision of either division of the department of public service, and of any and all other utilities doing business within such city to enable such city to defray the cost of granting unemployment, work and home relief."

Said Local Law provides that all revenues and moneys resulting from the imposition of the taxes thereby imposed shall not be credited or deposited in the general fund of the City but shall be deposited in a separate bank account or

accounts, and shall be available and used solely and exclusively for the purpose of relieving the people of the City of New York from the hardships and suffering caused by unemployment, including the repayment of moneys borrowed for such purpose.

Said Local Law No. 30 of 1935 is entitled in the same manner as said Local Law No. 21 of 1934, as amended, and it is substantially in all respects the same in its provisions as said Local Law No. 21 of 1934, as amended, except that it imposes the tax for the period from January 1, 1936 to June 30, 1936.

3. The judgment sought to be reversed was entered on August 9, 1937, and was resettled, on motion of the appellee, on August 11, 1937. The date upon which the application for appeal is presented is August 24, 1937.

4. This action was brought to recover the amounts of taxes collected by the City of New York from the appellant under the said Local Laws, and paid by appellant under duress and protest, on the ground that the said Local Laws are repugnant to the Constitution of the United States.

The amended complaint alleges, in part, that said Local Laws contravene Section 1 of the Fourteenth Amendment to the Constitution of the United States because, among other reasons—

(A) they deny to appellant equal protection of the law, in that, *inter alia*,

(a) the taxes levied thereby are measured by a percentage of gross income and applied to a group of corporations, the respective businesses of which are essentially different in character, yielding widely differing ratios of profits, the result being that gross inequalities are produced in the distribution of the tax burden, the appellant and all other street rail-

road corporations doing business in the City of New York being taxed far more heavily upon their respective net incomes for relief of unemployment than other utilities in the taxed class,

- (b) appellant and other street railroad corporations doing business in the City of New York do not have protection against competition which other utilities, subject to said Local Laws, have, and appellant does not have the advantage enjoyed by other utilities in the taxed class of being assured a fair return on its capital investment since it is limited to a fixed rate of fare by contract with the appellee itself, from which no release can be obtained by appellant,
 - (c) the object of said Local Laws is not to raise revenues for the general support of the government but to raise money for a specific and limited purpose and there is no difference between utilities and other businesses which bears any relation to said purpose which justifies a classification by which utilities are taxed for said purpose far more heavily than other businesses, and
 - (d) the imposition of a tax to be used solely for unemployment relief upon utilities at a rate more than 3,000% in excess of the rate at which other businesses are taxed for said purpose constitutes hostile discrimination against utilities; and
- (B) they deprive appellant of its property without due process of law in that the money exactions levied upon appellant thereby are not for the general support of the government and hence are not taxes, but an expropriation of money from one group for the benefit of another, which expropriation cannot be sustained as part of any plan of regulation since, under the allegations of the amended complaint, utilities have no special relation to or responsibility for the situation which the proceeds of the exactions are designed to

alleviate and do not receive any special benefit from the money expended for such purposes.

The appellee, the City of New York, moved to dismiss the amended complaint on the ground that it failed to state facts sufficient to constitute a cause of action and on the further ground that the court had no jurisdiction of the action. Said motion thus drew into question the validity of the said Local Laws. The Supreme Court of the State of New York at Special Term, Part III thereof, where the motion was originally heard, determined said motion upon authority of, and in accordance with its determination of a like motion in the companion case of *New York Rapid Transit Corporation v. The City of New York*, decided simultaneously therewith. The opinion of said Court in said companion case shows that said Court held that the court had jurisdiction of the above-entitled action and that it denied said motion on the ground that the amended complaint sufficiently showed that the said Local Laws denied to the appellant the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States. Said opinion in said companion case (the amended complaint in which contains allegations which are substantially identical with those in the amended complaint in the above-entitled action) states:

“Additional facts are alleged from which conclusions are drawn as to the validity of the local laws. Certain of those claims are set forth in various forms, but analysis reduces them to the following: The tax being on gross income is improper because it is ruinous and because it creates inequality; the tax places a greater burden on one group of taxpayers, the utilities, than on others; the tax is improper in that it is imposed upon some engaged in transportation and not others; that the method of defining utilities in the local law is unfair thereby making an improper classification; and, par-

ticularizing, the plaintiff differs from the other utilities in that it is prevented by contract from increasing its rates and cannot pass the effect of the tax on to its consumers.

"Investigating these in order it will be seen from the foregoing that the weight of the burden of the tax does not affect its validity. The point of inequality is factually supported. Plaintiff does business on a shorter margin of profit than many of the other persons subject to the tax. The consequent result is that the percentage of plaintiff's profit taken by the tax exceeds that taken from the others in the same group. It is shown that this difference amounts in at least one instance to 300 per cent. It is further alleged that this discrepancy comes about not through different methods of management or the like, but because of the essential differences in the nature of the business conducted by the two utilities. Exact equality is not required of a tax (*Clark v. Titusville*, 184 U. S. 329). Nor is there anything inherently improper in a tax on gross receipts (*Metropolis Theatre Co. v. Chicago*, 228 U. S. 61). Where, however, gross inequalities result from that method of taxation, and where this inequality is effectuated by the definition of the class to be taxed, the tax must fail (*Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550). On this point the allegations of the complaint are sufficient. * * * (97 N. Y. L. J. 241; 251 App. Div. —.)

The order of the Supreme Court of the State of New York denying said motion to dismiss the amended complaint was made on January 14, 1937, and entered on January 15, 1937.

On appeal by the appellee, said order was affirmed without opinion by the Appellate Division of the Supreme Court of the State of New York by order made and entered on May 21, 1937. Before said Appellate Division the appellant contended that said Local Laws were unconstitutional as to it not only upon the ground upon which they were held invalid, upon the allegation of the amended complaint, by

the said Supreme Court at Special Term, but also upon the other grounds alleged in the amended complaint.

On motion of appellee, and by order entered June 1, 1937, the said Appellate Division of the Supreme Court of the State of New York granted appellee leave to appeal to the Court of Appeals of the State of New York from its order affirming said order of said Supreme Court at Special Term, and certified to said Court of Appeals the question: "Does the complaint herein state facts sufficient to constitute a cause of action." Before said Court of Appeals the appellant contended that said Local Laws were unconstitutional not only upon the ground upon which they were held invalid, upon the allegations of the amended complaint, by the Special Term and the Appellate Division of said Supreme Court, but also upon the other grounds alleged in the amended complaint. Said Court of Appeals expressly determined said appeal and answered said certified question on authority of its decision and opinion in said companion case of *New York Rapid Transit Corporation v. The City of New York* (in which a like motion had been made by appellee and in which the action of the Special Term and Appellate Division of said Supreme Court had been the same as in the above-entitled cause). The opinion in said companion case shows that said Court of Appeals held that the court had jurisdiction of the action and that the amended complaint stated a cause of action if said Local Laws violated the Constitution of the United States, but it held that said Local Laws did not violate said Constitution. A copy of said opinion is attached hereto and made a part hereof as Exhibit A (see 275 N. Y. 258; 275 N. Y. Memoranda 2).

On July 13, 1937, said Court of Appeals made and entered its remittitur by which it ordered and adjudged that the said orders of the Special Term and of the Appellate Division of the Supreme Court be reversed and that the amended complaint be dismissed with costs in all courts,

and answered the question certified in the negative. Said Court of Appeals ordered and adjudged that the amended complaint be dismissed on the ground that it failed to state facts sufficient to constitute a cause of action since, it held, the said Local Laws were valid as applied to appellant and did not violate the Constitution of the United States, and by its said remittitur ordered that the record and all proceedings herein be remitted to the Appellate Division of the Supreme Court of the State of New York, there to be proceeded upon according to law.

Said Court of Appeals is the highest court of the State of New York.

By order made and entered on August 6, 1937, said Appellate Division directed that the order and judgment of said Court of Appeals be made its order and judgment, and thereupon and pursuant thereto, on the 9th day of August, 1937, a final judgment was entered in the office of the Clerk of the Supreme Court of the State of New York, New York County, finally determining the action by a dismissal of the amended complaint. Thereafter upon motion of the appellee, said judgment was resettled, so as to correct certain formal omissions but in no other respect changing it, by order of said Supreme Court made on August 11, 1937, and entered on August 12, 1937.

The said judgment is a final judgment and was entered as a result of a decision by the Court of Appeals, the highest court of the State of New York, which decision turned upon the question as to whether or not the Local Laws of the City of New York above mentioned were repugnant to the Constitution of the United States, and the decision of said Court of Appeals was in favor of their validity. The action is thus one in which an appeal lies to the Supreme Court of the United States as a matter of right.

5. Said record of the proceedings herein is now with the Supreme Court of the State of New York.

6. The following decisions are believed to sustain the jurisdiction of this Court: *Nashville, etc., Ry. v. White*, 278 U. S. 456; *Home Ins. Co. v. Dick*, 281 U. S. 397, 407; *Chicago, R. I. & Pac. Ry. v. Perry*, 259 U. S. 548, 551; *Senior v. Braden*, 295 U. S. 422; *W. H. H. Chamberlin, Inc., v. Andrews, Industrial Commissioner*, 299 U. S. 515; *Nor. Car. R. R. Co. v. Zachary*, 232 U. S. 248, 257.

7. The questions sought to be reviewed herein have not been foreclosed by prior decisions of the Supreme Court of the United States.

The amended complaint alleges that the operating expenses of street railroad corporations, such as appellant, are far higher in proportion to gross receipts than the operating expenses of all other corporations included within the class taxed by said Local Laws; that the ratio of net income to gross receipts is far higher in the case of all other types of utilities within the taxed class than in the case of appellant or any other street railroad corporation included therein; that said Local Laws impose a tax measured by a percentage of gross income upon a class which includes corporations the respective businesses of which are so essentially different in character that the ratio of net income to gross income in the case of one is radically less than in the case of another, the result being that said Local Laws produce gross inequality in the distribution of the tax burden within the taxed class itself, taxing some members thereof far more heavily than others on the value of the privileged taxed, so that plaintiff and all other street railroad corporations are taxed far more heavily upon their respective net incomes than other utilities within the taxed class.

No case has been found in which this Court has sustained under the equal protection clause of the Fourteenth Amendment a State tax on gross income as applied to a class of corporations the respective businesses of which are essentially different in character and yield widely varying ratios of profit. On the contrary, in *Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550, the Court held that a graduated tax on gross receipts imposed as a license tax on all retail merchants was unconstitutional, under the Fourteenth Amendment, because of the gross inequalities which the evidence showed resulted therefrom, it appearing that companies with large gross incomes had less net income than companies with smaller gross incomes, that the ratio of net income to gross varied with the character of the business as well as its volume. The Court there said that if a State "desires to tax incomes it must take the trouble equitably to distribute the burden of the impost." See also *Valentine v. Great Atlantic & Pacific Tea Company*, 299 U. S. 32.

Apart from the foregoing, the inclusion of appellant in the taxed class was unreasonable, and in violation of said equal protection clause, because, as alleged in the amended complaint, appellant and other street railroad corporations operating in the City of New York do not have protection against competition which other utility corporations have (since appellant meets with serious competition from the operation of street railroads by the appellee itself, without any supervision or control by either division of the Department of Public Service) and since appellant does not have the advantage enjoyed by other utilities of being assured of a fair rate of return on its capital investment since it is limited to a fixed rate of fare by contract with the appellee itself from which no release can be obtained by appellant. Thus, though nominally a utility, appellant does not have the essential characteristics thereof. Recently the New

York Court of Appeals itself held the Local Laws in question invalid as to a cold storage warehouse corporation on the ground that it did not possess the characteristics of a utility. *Merchants Refrigerating Co. v. Taylor*, 275 N. Y. 113.

The taxes in question are not for the support of the Government but are to be used exclusively for the purpose of unemployment relief. The amended complaint alleges that utilities are no more responsible for or related to the problem of unemployment relief than other businesses, that utilities receive no special benefit from the taxes in question and that the proceeds thereof are to be used for a purpose which is of equal concern to all and which benefits the persons and corporations so taxed no more, in proportion to wealth, property or income, than any other person or corporation doing business in the City of New York. The Supreme Court has repeatedly stated that classification for purposes of taxation must rest upon some real ground of distinction which has a substantial relation to the object of the legislation. " * * * the classification itself [must] be rested upon some ground of difference having a fair and substantial relation to the object of the legislation." (*Stebbins v. Riley*, 268 U. S. 137, 142; see also *Colgate v. Harvey*, 296 U. S. 404, 423). The declared object of this legislation was the relief of suffering caused by unemployment and there are, under the allegations of the amended complaint and as a matter of judicial notice, no differences between utilities and other businesses as related to such object which would justify the taxes here in question. This Court has never held that a State may, within the limits of the Fourteenth Amendment, impose a tax on a narrow class of corporations much in excess of that at which other corporations are taxed, not for the general support of the Government but for a special and limited purpose no more related to such narrow class of corporations than to corporations and

businesses generally. Construing comparable provisions of State constitutions, State courts have held invalid taxes imposed for special purposes not peculiarly related in some fashion to the persons upon whom the taxes were imposed, on the ground that classification for taxation must be grounded upon some distinction which has a substantial relation to the particular object to be accomplished by the law in question. *Lowry v. City of Clarksdale*, 154 Miss. 155, 122 So. 195, 197-198; *Continental Ins. Co. v. Smrha*, 131 Nebr. 791, 270 N. W. 122; *Louisiana v. Merchants' Insurance Co.*, 12 La. An. 802.

The imposition of a tax to be used solely for unemployment relief upon utilities at a rate *more than 3,000% in excess of the rate at which other businesses are taxed* for the same purpose constitutes hostile discrimination against utilities and denies to them the equal protection of the law, in violation of the Fourteenth Amendment. The difference in the rate of the tax is the same as though ordinary businesses were taxed at less than 3% of their gross income and utilities at 90% thereof. In *Royster Guano Co. v. Virginia*, 253 U. S. 412, Mr. Justice Brandeis stated (pp. 417-418) that the Fourteenth Amendment forbids "action attributable to hostile discrimination against particular persons or classes."

The money exactions levied upon appellant by the Local Laws in question are not for the general support of the Government and hence are not properly taxes but are an "expropriation of money from one group for the benefit of another" in violation of the due process clause of the Fourteenth Amendment. Such expropriation cannot be sustained as part of any plan of regulation since, under the allegations of the amended complaint, utilities have no special relation to or responsibility for the situation which the proceeds of the exaction are designed to alleviate. *United*

States v. Butler, 297 U. S. 1, 58, 61. *Rickert Rice Mills v. Fontenot*, 297 U. S. 110, 113. *Edye v. Robertson*, 112 U. S. 580, 595-596; *United States v. La Franca*, 282 U. S. 568, 572.

Dated August 24, 1937.

Respectfully submitted,

BROOKLYN AND QUEENS TRANSIT
CORPORATION,

Appellant,

By PAUL D. MILLER,
GEORGE D. YEOMANS,

Its Attorneys.

Office and Post Office Address:

385 Flatbush Avenue Extension,

Borough of Brooklyn,

City and State of New York.

EXHIBIT "A".

NEW YORK RAPID TRANSIT CORPORATION, *Respondent*,

v.

CITY OF NEW YORK, *Appellant*.

New York Rapid Transit Corp. v. City of New York, 251 App. Div. —, reversed.

Argued June 10, 1937; decided July 13, 1937.

Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered May 21, 1937, which affirmed an order of Special Term denying a motion by defendant for a dismissal of the complaint.

The following question was certified: "Does the complaint herein state facts sufficient to constitute a cause of action?"

Paul Windels, Corporation Counsel (Paxton Blair, Oscar S. Cox, Sol Charles Levine and Meyer Bernstein of counsel), for appellant.

Harold L. Warner, Henry Root Stern, Paul D. Miller and George D. Yeomans for respondent.

J. Osgood Nichols for Thomas E. Murray, Jr., as receiver of Interborough Rapid Transit Company, *amicus curiae*.

FINCH, J.:

The city of New York appeals from the denial of a motion to dismiss the complaint, affirmed without opinion by the Appellate Division, two justices dissenting, and here by reason of the Appellate Division certifying the question: Does the complaint herein state facts sufficient to constitute a cause of action?

This is an action for money had and received, brought by a transit company to recover taxes paid under protest, upon the ground that the taxing statutes are unconstitutional.

The city of New York, pursuant to enabling acts passed by the State Legislature, which empowered the city to impose any tax or taxes which the Legislature itself could

impose, to raise money for unemployment relief, has enacted local laws placing a tax of three per cent on the gross income of all utilities subject to the supervision of either division of the Department of Public Service. (Local Law No. 30, 1935; Local Law No. 21, 1934, as amended by Local Law No. 2, 1935.)

At the outset, the city urges that the complaint should be dismissed on the ground that the remedy by way of action for money had and received is not available since the local laws provide an exclusive remedy for the recovery of illegally collected taxes, whether the illegality of the collection is because of over-assessment, over-valuation, or unconstitutionality. The remedy provided by the local laws furnishes a more expeditious procedure than the action at common law with its six year Statute of Limitations. It requires that all applications for refunds be made within one year of the payment of the tax and that a review by certiorari be applied for within thirty days of the refusal of the Comptroller to grant the refund. (Local Law No. 30, 1935, § 10; Local Law No. 21, 1934, as amended by Local Law No. 2, 1935, § 10.)

The provision on which the city relies applies to applications for refunds when the tax is "erroneously or illegally collected." The city points out that this is not a case where the laws as a whole are void. As applied to other public utilities they are perfectly valid. Only as applied to corporations situated as is the plaintiff is the claim made that they are void. But while it is clear that an exclusive remedy is provided for the recovery of illegal or erroneous exactions of an otherwise valid tax, it is not at all clear that it was intended to apply where the claim is made that the tax itself is void because of unconstitutionality. In view of this ambiguity we cannot construe the laws as depriving the plaintiff of the common law remedy of action for money had and received. (See *Buder v. First Nat. Bank*, 16 Fed. Rep. [2d] 990, 993; certiorari denied, 274 U. S. 743.) Having reached the conclusion that the exclusive remedy provided for by the local law does not apply where it is claimed that the tax is unconstitutional, it becomes unnecessary to determine whether the

powers delegated by the Legislature to the city of New York included the power to provide such an exclusive remedy.

This brings us to the contention that the tax is unconstitutional.

The constitutionality of this statute, in so far as the tax is levied on certain other public utilities, has been upheld. (*New York Steam Corp. v. City of New York*, 268 N. Y. 137; *Garfield v. New York Tel. Co.*, 268 N. Y. 549.) The contention is now made that in so far as the tax is levied on transit companies bound by contract to exact no more than a five-cent fare, it is invalid. This argument has been rejected in the Federal courts (*Southern Blvd. Ry. Co. v. City of New York*, 86 Fed. Rep. [2d] 633; certiorari denied, 301 U. S. —), but that determination, while entitled to great weight, is not binding on this court.

At Special Term the complaint was held invalid on every ground save one, and that presents the major question for decision. To paraphrase that ground as alleged in the complaint, the tax was imposed at the same rate on gross incomes of different types of corporations " * * * which are so essentially different in character that the ratio of net income to gross receipts in the case of one is radically less than in the case of another * * *."

Special Term, after conceding that exact equality is not required of a tax and that there is nothing inherently improper in a tax on gross receipts, sustained the complaint on the ground that " * * * gross inequalities result from that method of taxation, and where this inequality is effectuated by the definition of the class to be taxed, the tax must fail," citing *Stewart Dry Goods Co. v. Lewis* (294 U. S. 550).

The particular inequality and inequity claimed by the plaintiff is that it is arbitrarily classified, and that the burden of the tax does not fall equally on all those within the group—that the transit companies are required to pay a much greater percentage of their profits than other utilities. In other words, the constitutional objection is to the inclusion of corporations with relatively small net earnings under a fixed income tax rate, in a class with cor-

porations enjoying a ratio of net to gross so radically different as to effect an inequality of burden. Even if so, this does not furnish sufficient reason for declaring a tax invalid where it is imposed upon a group otherwise reasonably classified. Thus in *Alaska Fish Co. v. Smith* (255 U. S. 44), a tax imposed on herring products was held valid although no tax was levied on other fish or fish products. Also taxes imposed upon wholesale dealers in oil and like products, and not on other wholesale dealers (*S. W. Oil Co. v. Texas*, 217 U. S. 114), and taxes upon chain stores (*Tax Commissioners v. Jackson*, 283 U. S. 527), and many like taxes, have been upheld although it is evident that the burden of the tax falls more heavily on some in the classification than on others, whether by reason of low margin of profit, contractual obligations, competition, or other circumstances. The remedy if needed lies not with the judiciary but with the Legislature. (*McCray v. United States*, 195 U. S. 27, 56 *et seq.*)

The tax on gross receipts, which was held unconstitutional in *Stewart Dry Goods Co. v. Lewis* (294 U. S. 550), was a graduated or sliding scale tax on gross receipts, as contrasted with the fixed rate tax in the case at bar, and it was held therein by a majority of the court that there had been "no finding that the relation between gross sales and net profits, or increase of net worth, was constant, or even that there was a rough uniformity of progression within wide limits of tolerance" (p. 559).

The fallacy in the contention that the tax is unconstitutional because it classifies transit companies having a present small margin of profit and contractual inhibition against raising the fare charged by them, with other utilities having much larger margins of profit, is further revealed when we take into consideration that transit companies might have been grouped by themselves and a three percent gross receipts tax imposed while a separate three percent tax was imposed on other utilities. The transit companies could make no valid objection to a tax so imposed. Concerned as we are primarily with substance rather than form, we see no reason for holding a tax on a certain type of utility invalid because it is imposed as

part of a general tax on all utilities, when the same result could have been achieved by taxing various types of utilities under separate classifications.

The plaintiff insists also that the complaint is sufficient upon other grounds denied by the court at Special Term and affirmed by the Appellate Division. The plaintiff argues that the tax in question impairs the obligations of the contract of plaintiff with the city in violation of section 10 of article I of the Federal Constitution. The fact that the transit company, with State sanction, has entered into a contract with the city of New York which provides that it shall not charge more than a five-cent fare, in and of itself does not entitle it to exemption from tax. It has long been established that a grant of a franchise does not carry with it an implied surrender of the power to tax. (*Memphis Gas Light Co. v. Shelby County*, 109 U. S. 398; *St. Louis v. United Rys. Co.*, 210 U. S. 266; *Puget Sound Light & Power Co. v. Seattle*, 291 U. S. 619.)

In *Brooklyn Bus Corp. v. City of New York* (274 N. Y. 140, 147) the contract specifically provided that "any new form of tax or additional charge that may be imposed by any ordinance of the City or resolution of the Board upon or in respect of the franchise * * * shall be deducted from the compensation payable to the City." In that case we held that the contract provision was intended to apply to local laws as well as other forms of additional taxes. The contracts of the transit companies with the city contain no such provision, and no reason appears for reading such a provision into the contracts. The transit companies contracted with the city to provide service at a five-cent fare, and to apportion their gross revenues according to a formula whereby the city and the companies are to share the income, but only after the companies have been paid interest and sinking fund allowances on new moneys invested in the project. Taxes, of course, have priority over such interest and sinking fund payments.

Nevertheless, an attempt is made to argue that the imposition of the tax impairs the obligations of the contract in violation of article I, section 10, of the Federal Constitution because it enables the city to obtain funds out of

the gross income without giving priority to the interest and sinking fund payments. The right to tax cannot be lost by such tenuous implication, and all doubt vanishes when we find that the contract itself makes provision for the deduction of taxes from gross revenues, and refers to "all taxes or other governmental charges of every description (whether on physical property, stock or securities, corporate or other franchises, or otherwise) assessed or which may hereafter be assessed against the lessee in connection with or incident to the operation of the railroad and the existing railroads." There is thus no basis whatever for reading into the above contract any express or implied obligation on the part of the city to surrender its power to tax the privilege granted to the plaintiff under laws either in existence at the time of the contract or thereafter enacted. Nor can any merit be found in the argument that the enabling acts, although general in language, must be construed as not intended to apply to transit companies because of their pre-existing contracts with the city.

Plaintiff further contends that the local laws in question deny plaintiff the equal protection of the laws under the Federal Constitution, in that they classify street railroad corporations and other utilities for taxation at a higher rate than ordinary business corporations for the special purpose of unemployment relief.

No one of the above contentions is well founded. We have already decided that the imposition of a tax on utility companies without imposing a similar tax on other industries and businesses is a valid classification and does not constitute a denial of the equal protection of the laws. (*New York Steam Corp. v. City of New York*, 268 N. Y. 137; *Puget Sound Power & Light Co. v. Seattle*, 291 U. S. 619.)

Likewise the tax is not invalid because imposed upon utilities with the proceeds earmarked for purposes of unemployment relief. In sustaining the imposition upon the processing of cocoanut oil of a tax which Congress declared should "be held as a separate fund and paid to the Treasury of the Philippine Islands" (48 U. S. Stat. 680, 763), the court said: "Standing apart, therefore, the tax is unassailable. It is said to be bad because it is earmarked.

and devoted from its inception to a specific purpose. But if the tax, *qua* tax, be good, as we hold it is, and the purpose specified be one which would sustain a subsequent and separate appropriation made out of the general funds of the Treasury, neither is made invalid by being bound to the other in the same act of legislation." (*Cincinnati Soap Co. v. United States*, 301 U. S. —; 57 Sup. Ct. Rep. 764.)

Nor may street railroads successfully resist this tax because of alleged competition by city owned subways and by taxicabs, both of which are exempted from this classification. A city's conduct in operating its own subways, and exempting them from taxation, does not render an act unconstitutional. (*Puget Sound Power & Light Co. v. Seattle*, 291 U. S. 619.) Innumerable valid reasons suggest themselves for treating taxicabs differently from transit companies and other utilities. (See *Hicklin v. Coney*, 290 U. S. 169, and cases cited therein.)

Plaintiff further contends that the tax bears so heavily upon it as not to constitute taxation at all, but to amount to a taking of its property without compensation in violation of the due process clause of the Fourteenth Amendment to the Federal Constitution.

Plaintiff seeks to support the above contention through a process of elimination by insisting that these taxes cannot be justified otherwise and hence must amount to a taking of property. As we have heretofore shown, the classification of the utilities and the imposition of these taxes for unemployment relief is not unlawful. Moreover, hardship arising from the burden of taxation or excessiveness does not render invalid an otherwise valid tax. (*Fox v. Standard Oil Co.*, 294 U. S. 87. Cf. *Great Northern A. & P. Co. v. Grosjean*, 301 U. S. —; *Power v. Pennsylvania*, 127 U. S. 678.)

It follows that the orders should be reversed and the complaint dismissed with costs in all courts, and the question certified answered in the negative.

Crane, Ch. J., Lehman, Hubbs, Loughran and Rippey, JJ., concur; O'Brien, J., taking no part.

Orders reversed, etc.

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CHARLES ELMORE CROPLEY
CLERK

IN THE
Supreme Court of the United States

October Term, 1937

No. 436

**BROOKLYN AND QUEENS TRANSIT
CORPORATION**

Appellant

against

THE CITY OF NEW YORK

**ON APPEAL FROM THE SUPREME COURT OF THE
STATE OF NEW YORK**

BRIEF FOR THE APPELLANT

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Outline of the Challenged Local Laws and the Under- lying State Enabling Acts	3
Statement	6
Specification of Errors	13
Summary of Argument	14
Argument	15
CONCLUSION	17

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BRIEF FOR THE APPELLANT

Opinions Below

The opinion of the Court of Appeals of the State of New York in *New York Rapid Transit Corporation v. The City of New York* (Case No. 435), which was argued and decided at the same time as the case at bar and on the authority of which the decision in the case at bar was based (R. 56) is reported in 275 N. Y. 258 and 9 N. E. (2d) 858. The memorandum decision of the Court of Appeals of the State of New York in the case at bar (R.

55-56) will be found in 275 N. Y. Mem. The memorandum decision of the Appellate Division of the Supreme Court of the State of New York (R. 54-55) is reported in 251 App. Div. (Mem.) 710. The opinion of the Supreme Court of the State of New York at Special Term in the *New York Rapid Transit Corporation* case (R. 48-52), on the basis of which that court decided the case at bar (R. 2), is not reported.

Jurisdiction

The jurisdiction of this Court is based on § 237 (a) of the Judicial Code as amended (U. S. C., Title 28, §344 (a)). The judgment sought to be reversed was entered on August 9, 1937 (R. 58-59), and was resettled, on motion of the appellee, on August 11, 1937 (R. 60-61). The appeal was allowed on August 24, 1937 (R. 62-63). The judgment sought to be reviewed is the final judgment of the highest court in which decision could have been had.

The Federal question is as to the validity, under the Federal Constitution, of certain Local Laws of the City of New York. This question was raised *in limine* in the complaint (R. 16-20) and was specifically determined in the opinion of the Court of Appeals (Case No. 435, R. 64-67; case No. 436, R. 56).

Questions Presented

1. Whether the challenged Local Laws deny to appellant the equal protection of the law, in violation of the Fourteenth Amendment.
2. Whether said Local Laws deprive appellant of its property without due process of law, in violation of the Fourteenth Amendment.

Outline of the Challenged Local Laws and the Underlying State Enabling Acts

By Ch. 873, Laws of 1934 (R. 23-24), the New York Legislature authorized any city of the State with a population of 1,000,000 or more, from August 18, 1934, to December 31, 1935—

“to adopt and amend local laws [effective during the period mentioned] imposing in any such city any tax and/or taxes which the legislature has or would have power and authority to impose to relieve the people of any such city from the hardships and suffering caused by unemployment. . . .”

including (R. 24) “a tax on gross income or a tax on gross receipts of persons, firms and corporations doing business in any such city.”

By Ch. 601, Laws of 1935 (R. 25-27) this authority was extended to July 1, 1936.

Both these Acts provided that revenues from the taxes authorized “shall not be credited or deposited in the general fund of any such city but shall be deposited in a separate bank account or accounts and shall be available and used solely and exclusively for the relief purposes *for which* the said taxes¹ have been imposed under the provisions of this Act.”

¹ These enabling Acts, which are set forth in full as exhibits to the complaint (R. 23-27), were substantially identical with Ch. 815, Laws of 1933, by which the State Legislature, for the first time in its history, “conferred upon a municipal corporation authority to enter the field of indirect or excise taxation.” *New York Steam Corp. v. City of New York*, 268 N. Y. 137, 144; 197 N.E. 172, 174. The original enabling Act was effective only until February 28, 1934, but the power thus delegated to the City was continued until December 31, 1934 by Ch. 302, Laws of 1934, which was in turn followed by the two enabling Acts here involved. Each year since the power so delegated has been extended by a similar Act. Ch. 414, Laws of 1936; cf. Ch. 321, Laws of 1937.

Under the authority thus granted, the Municipal Assembly of the City of New York enacted Local Law No. 21 of 1934 (later amended slightly by Local Law No. 2 of 1935), the title of which reads in part as follows (R. 27):

"A Local Law to relieve the people of the City of New York from the hardships and suffering caused by unemployment: * * * by imposing an excise tax on the gross income of every person doing business within such city and subject to supervision of either Division of the Department of Public Service, and of any and all other utilities doing business within such city, to enable such city, to defray the cost of granting unemployment, work and home relief." (Italics ours.)

Section 2 of said Local Law provided (R. 29) that—

"Notwithstanding any other provision of law to the contrary, for the privilege of exercising its franchise or franchises, or of holding property, or of doing business in the city of New York, during the calendar year nineteen hundred thirty-five or any part thereof, *every utility doing business in the city of New York and subject to the supervision of either division of the department of public service,* shall pay * * * an excise tax which shall be equal to three percentum of its gross income for the calendar year nineteen hundred and thirty-five * * *. Such tax shall be in addition to any and all other taxes and fees imposed by any other provision of law * * *." (Italics ours.)

Section 14 thereof, following the legislative mandate, provided (R. 36-37) that revenues resulting from the tax should not be deposited in the City's general fund, but should be deposited in a separate account to be used—

"exclusively for the purposes of relieving the people of the city of New York from the hardships and suffering caused by unemployment, including the repayment of moneys borrowed for that purpose."

By said Local Law the word "utility" was defined to mean (R. 28-29)—

"any person subject to the supervision of either division of the department of public service and every person whether or not such person is subject to such supervision who shall engage in the business of furnishing or selling to other persons, gas, electricity, steam, water, refrigeration, telephony, and/or telegraphy, * * *,"

and the term "gross income" was defined (R. 28), in the broadest possible fashion, to include all receipts of cash, credits or property of any kind, and from whatever source derived, without deduction on account of the cost of property sold, materials used, labor or services or other costs, or any other expense whatsoever.

Any "utility" not subject to the supervision of either division of the Department of Public service was, under said Local Law, subjected to a tax of 3% of "gross operating income," which was broadly defined as including all receipts whatever from the sale of gas, electricity, steam, water, refrigeration, telephony or telegraphy (R. 28, 38).

Local Law No. 21 of 1934, as amended, was followed by Local Law No. 30 of 1935, which is entitled in the same manner as its predecessor, and is substantially in all respects the same except that it imposed the tax for the period from January 1, 1936, to June 30, 1936 (R. 37-47).

The taxes sought to be recovered (aggregating \$756,879.50, and covering the year 1935 and the first six-months of 1936) were imposed under said two Local Laws.²

Statement

This is an appeal from a final judgment of the Supreme Court of the State of New York (R. 58-61), entered pursuant to remittitur of the Court of Appeals, of said State (R. 55-56), dismissing appellant's amended complaint (herein referred to as the complaint) on the ground that it does not state facts sufficient to constitute a cause of action.

Appellant sued in the trial court to recover taxes in the aggregate sum of \$756,879.50 exacted from it by the City, the appellee, under purported authority of the Local Laws above described, and paid by it under protest and duress (R. 9-10), on the ground that said Local Laws, as applied to appellant, were repugnant to the Federal Constitution (R. 17-20). The City moved to dismiss the complaint on the ground that it failed to state a cause of action and on the further ground that the court was without jurisdiction (R. 2-3). The Supreme Court, at Special Term, denied the City's motion, holding that the court had jurisdiction of the action, and that upon the allegations of the complaint the Local Laws were invalid.

² The two Local Laws here involved, which are set forth in full as exhibits to the complaint (R. 27-47), were preceded by Local Law No. 19 of 1933, which imposed a similar "excise tax" (at a lower rate, however) for the period from September 1, 1933, to February 28, 1934. See *New York Steam Corp. v. City of New York*, 268 N. Y. 1937; 197 N. E. 172. This was followed by Local Law No. 10 of 1934, effective from March 1, 1934, to December 31, 1934, which was in turn followed by the two Local Laws here attacked. Thereafter the tax was continued by Local Law No. 30 of 1936; cf. Local Law No. 23 of 1937.

as applied to appellant in that they denied to it the equal protection of the law in violation of the Fourteenth Amendment (R. 2, 48-52).

On appeal to the Appellate Division the order entered at Special Term was affirmed without opinion (R. 54-55). Thereafter the Appellate Division granted appellee leave to appeal, and certified to the Court of Appeals the question: "Does the complaint herein state facts sufficient to constitute a cause of action?" (R. 53-54). The Court of Appeals, in an opinion written by Judge FINCH, held that the trial Court had jurisdiction (R. 55-56; Case No. 435, R. 63-64) but it sustained the validity of the challenged enactments, holding that they did not violate the Constitution of the United States and that consequently the complaint did not state facts sufficient to constitute a cause of action (R. 55-56; Case No. 435, R. 64-68). By its remittitur said Court, answering the question certified in the negative, directed that the orders of the lower courts be reversed, and that the complaint be dismissed with costs (R. 55-56).

In addition to the allegations (R. 4-8, 9-10) setting forth the enactment of the two Enabling Acts (p. 3, *supra*) and the challenged Local Laws (pp. 4-5, *supra*) and showing the payment by the appellant, under duress and protest, of taxes imposed by said Local Laws in the amount of \$756,879.50, during 1935 and the first half of 1936, the complaint contains allegations in substance as follows:

The appellant is a street railway corporation organized and existing under the laws of New York and engaged in the operation of a system of street surface railroads in the City of New York. As such, it is subject to the supervision of the Transit Commis-

sion, which is the Metropolitan Division of the Department of Public Service (R. 3-4).

In addition to the 3% excise tax on the gross income of utilities here involved, the City, acting under the same enabling Acts (described at p. 3, *supra*), imposed, effective during 1935 and the first half of 1936, an excise tax on financial businesses of $\frac{1}{5}$ of 1% of all gross income in excess of \$5,000, and an excise tax on businesses generally (other than utilities and financial businesses) of $\frac{1}{10}$ of 1% of all gross receipts in excess of \$15,000, derived from business carried on in the City (R. 10-11).

Apart from the aforesaid gross income or gross receipts taxes, the only taxes imposed by the City under said enabling Acts for the purpose of unemployment relief, and effective during the eighteen months' period here involved, were (R. 10-11)—

- (a) a general 2% sales tax, payable by the purchaser and applicable to utilities as well as others;
- (b) a general 2% tax on certain articles of personal property [in respect of which a sales tax had not been paid], applicable to utilities as well as to others; and
- (c) an estate transfer tax [which was repealed after it had been in effect only a few months].

The rate of fare which appellant is permitted to charge for transportation of passengers on the system of railroads operated by it is limited to five cents per passenger, except that in certain instances it may make an additional charge for transfers from one line of the system to another. The City has heretofore refused to permit any increase in the rate of fare (R. 12).

Neither the Transit Commission nor any other commission or body has the power to increase the rate of fare which appellant may charge for

the transportation of passengers, and there is no way, without the consent of the City, in which the appellant can secure the right to increase its rate of fare and no way in which the appellant can or could have passed on to the public any part of the burden of the taxes collected from it by the City under the provisions of said Local Laws, whereas other corporations, both utilities and businesses generally, are in a position to pass on to the public the burden of such taxes as they may be required to pay by increasing their prices for the goods sold or the services furnished by them (R. 12-13).

At the respective times of enactment of the said Local Laws the City itself was operating rapid transit railroads which competed and still do compete directly with the railroads operated by the appellant. Neither division of the Department of Public Service has any supervision over the railroads thus operated by the City, nor was the City required to obtain from either division of the department of Public Service a certificate of convenience and necessity for said railroads before constructing and operating the same. Some of the said railroads run directly parallel to and in the same streets over and along which railroads are operated by the appellant. These new railroads operated by the City directly and seriously compete with the railroads operated by the appellant, causing a substantial loss of income to the appellant, and the appellant has no protection whatever against such competition (R. 13-14).

At the time of the passage of said Local Laws upwards of 10,000 taxicabs were licensed and operated and are still licensed and operating in the City of New York for the transportation of persons for hire on, along and through the streets of the City. Although said taxicabs seriously compete with appellant and deprive it of substantial rev-

venues which it would otherwise receive, their operation has never been subject to the supervision of either division of the Department of Public Service and the appellant has no protection against such competition (R. 14).

Because of inherent differences in the character of the respective businesses (R. 20), the operating and maintenance expenses of railroad corporations (including the appellant) engaged in the operation of subway, elevated or street surface railroads in the City of New York are far higher in proportion to gross receipts than those of other types of businesses within the taxed class and subject to said Local Laws. Moreover, the ratio of net income to gross receipts is far higher in the case of corporations selling gas, electricity, refrigeration, steam, water, telephone service or telegraph service than in the case of appellant or any other street railroad included within the taxed class. As an illustration, the net income for 1935 of Brooklyn-Edison Company, a corporation selling electricity in the City of New York and subject to supervision by the Department of Public Service was, before deduction of taxes, about 42% of its gross receipts for said year, whereas appellant's net income for that year, before deduction of taxes, was about 14½% of its gross receipts. Other street railroad corporations doing business in the City, while having substantial gross receipts, were operated at a loss and had no net income, so that the taxes imposed by the Local Laws in question simply added to their deficits (R. 15-16).

Appellant is not engaged in any of the utility businesses specifically mentioned in the challenged Local Laws (see p. 5, *supra*), and was subjected to the tax imposed thereby solely because, being a common carrier engaged in the operation of rapid transit railroads in the City of New York, it is sub-

ject to the supervision of the Transit Commission, one of the two divisions of the Department of Public Service (R. 3-4, 6, 28, 38).

In addition to the tax here challenged, appellant is required by the New York Tax Law to pay to the State of New York an annual franchise tax "for the privilege of exercising its corporate franchise or holding property," and an additional franchise tax "for the privilege of exercising its corporate franchise or carrying on its business in such corporate or organized capacity." Moreover, appellant is required to pay annually to the City a special franchise tax on the value of its property and its special franchises to use the streets of the City for the operation of its railroads (R. 10, 11-12).

The said Local Laws are unconstitutional, null and void for the following, among other, reasons (R. 16-20):

1. They deprive the appellant and others of property without due process of law in that—

(a) The challenged taxes are measured by a percentage of gross income without regard to the net income of or the ruinous effect upon the persons and corporations purported to be taxed (R. 17).

(b) The persons and corporations purported to be taxed are required to pay the shares of others in the expense of a project which is of equal concern to all and which is no more related to the particular class which is taxed than to business in general (R. 18).

2. They deny to the appellant and other corporations the equal protection of the law in that—

(a) Though purporting to impose only emergency taxes for the special purpose of un-

employment relief, they arbitrarily single out one small group and tax that group upon the privilege of holding property and doing business within the City of New York at a rate which is 3000% higher than the rate at which businesses generally are taxed for the same purpose, thereby arbitrarily and with hostile design placing a ruinous burden upon a particular group of persons and corporations in an attempt to make them pay far more than their fair share of the cost of emergency relief, there being no sound or reasonable basis for the discrimination against them (R. 18).

(b) The definition of the word "utility" contained in the Local Laws is such as to make the classification unreasonable and void because, except as to the business of furnishing or selling gas, electricity, steam, water, refrigeration, telephone service or telegraph service, the character of the business in which any person or corporation may be engaged is not made the test of whether or not such person or corporation is within the taxable class, but the sole test thereof is whether or not such person or corporation is subject to the supervision of either division of the Department of Public Service, regardless of the character of his or its business (R. 19).

(c) Even if there be any reasonable basis for taxing other utilities more heavily than general businesses for the special purpose of unemployment relief, there is certainly no reasonable basis for taxing the appellant and other street railroads more heavily than business in general for that purpose, and it is wholly unreasonable to include the appellant in the same class with gas, electric, telephone and other

utility corporations because whereas the latter meet with little or no competition and can protect themselves from the ruination which might otherwise result from excessive taxation by obtaining higher rates for the utility service furnished by them, the appellant meets with substantial competition not only from taxicabs, but from the operation of new underground railroads by the City of New York, the taxing authority itself, and, being helpless to obtain any increase in the rate of fare which it may charge its passengers, it has no way of defending itself against confiscation and ruination resulting from excessive taxation (R. 19-20); and

(d) The said Local Laws impose a tax measured by a percentage of gross receipts upon a class defined in such a way as to include corporations, the respective businesses of which are so essentially different in character that the ratio of net income to gross receipts in the case of one is radically less than in the case of another, the result of which is that said Local Laws produce glaring inequality in the distribution of the tax burden within the taxed class itself, arbitrarily discriminating in favor of some and against other members of the class and taxing some far more heavily than others on the value of the privilege taxed (R. 20).

Specification of Errors

The appellant urges all of the assigned errors set forth in the Record (R. 67-70), which may be summarized as follows:

The Court of Appeals erred—

(1) In holding that the challenged Local Laws do not deny to appellant the equal protection of the law, in violation of the Fourteenth Amendment (R. 67-69).

(2) In holding that said Local Laws do not deprive appellant of its property without due process of law, in violation of the Fourteenth Amendment (R. 70).

Summary of Argument

The appellant contends that the challenged Local Laws deny to appellant the equal protection of the law and deprive it of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States for the reasons, (1) that, as to all utilities, the classification whereby they are taxed for the particular purpose of unemployment relief at a rate more than 3000% higher than that at which other businesses are taxed for the same purpose is without any rational basis and constitutes arbitrary and hostile discrimination against a particular class; (2) that the classification is particularly arbitrary and hostile as to the appellant and other street railroad companies operating in New York City because they do not have the advantages over businesses generally which are enjoyed by other types of utilities and are in an even poorer position than ordinary businesses to pay such a heavy tax, being wholly unable to offset such tax through an increase in the rate of fare which they may charge, and (3) that a tax measured by a percentage of gross income and applied to a class which includes street railroad companies along with gas, electric, telephone and

other utility companies results in gross inequalities in the distribution of the tax burden among the members of the taxed class itself due to the fact that, by reason of essential differences in the character of the respective businesses, street railroad companies, including appellant, operate at a far lower ratio of profit than other types of utilities, so that the tax takes a far larger percentage of their net income than of the net income of other utilities, and since the tax is imposed on the privilege of doing business, and since the value of such privilege is determined not by gross receipts but by the net profit which can be derived from the exercise thereof, street railroads are taxed far more heavily on the value of the privilege taxed than are other utilities.

ARGUMENT

This is a companion case to *New York Rapid Transit Corporation v. The City of New York*, No. 435, present Term, which is being argued simultaneously herewith. The two cases were begun at the same time and, the City having made identical motions to dismiss in both cases (No. 435, R. 2-3; No. 436, R. 2-3), were argued together in the State courts, this case having been decided by all three State courts on the basis of their respective decisions in the *New York Rapid Transit Corporation* case (No. 436, R. 2, 48-52, 54, 55-56).

The issues in the two cases are identical, so far as the appeals in this Court are concerned, except that the contention made by *New York Rapid Transit Corporation*, in case No. 435, to the effect that the challenged Local Laws impair the obligation of the contract between that appellant and the City, known as Contract No. 4, in violation of Section 10 of Article I of the Federal Consti-

tution, is not available to Brooklyn and Queens Transit Corporation, the appellant in the present case, since Brooklyn and Queens Transit Corporation does not operate under Contract No. 4 but under street railroad franchises from the City.

Since the facts alleged in the amended complaint herein (No. 436, R. 3-22) are in substance identical with those set forth in the amended complaint in the *New York Rapid Transit Corporation* case (No. 435, R. 3-28), save as the latter complaint relates to Contract No. 4, and since every argument made on behalf of New York Rapid Transit Corporation in case No. 435 is available to Brooklyn and Queens Transit Corporation in the present case (save, of course, the contention of New York Rapid Transit Corporation that the Local Laws in question impair the obligation of Contract No. 4)³, the appellant in the present case, in order to avoid unnecessary duplication, hereby adopts as the argument in support of its contentions on this appeal, and hereby incorporates herein by reference, the arguments set forth under Points I and II (pp. 17-60) in the brief of New York Rapid Transit Corporation in case No. 435.

³ One of the arguments advanced in the appellant's brief in the *New York Rapid Transit Corporation* case (pp. 35-44) is that the challenged tax is arbitrary and discriminatory as to said appellant because, among other reasons, said appellant is limited by Contract No. 4 to a five cent fare, and therefore, unlike other types of utilities subject to the tax, is unable, by means of an offsetting increase in its rate of fare, either to avoid confiscation resulting from excessive taxation or to pass on to the public some part, at least, of the burden of the tax. While that argument is equally available to Brooklyn and Queens Transit Corporation in this case (see No. 436, R. 12-13), it should perhaps be pointed out that the restriction on the rate of fare which this appellant may charge does not arise by reason of a contract with the City such as Contract No. 4 but by reason of rate provisions in this appellant's franchises which are beyond the regulatory power of the Transit Commission (see Record in No. 436, R. 12-13; see also cases in the New York Rapid Transit Corporation brief, pp. 36-37).

CONCLUSION

The allegations of the complaint show that the challenged Local Laws violate the appellant's constitutional rights and accordingly the complaint states facts sufficient to constitute a cause of action. The judgment appealed from should be reversed.

Respectfully submitted,

GEORGE D. YEOMANS,
Attorney for Appellant.

HAROLD L. WARNER,
PAUL D. MILLER,
ANDREW M. WILLIAMS,
ARTHUR A. BALLANTINE,
Of Counsel.

January, 1938.

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CHARLES ELMORE GREGLEY
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Supreme Court of the United States

October Term, 1937—No. 436.

BROOKLYN AND QUEENS TRANSIT CORPORATION,
Plaintiff-Appellant,

against

THE CITY OF NEW YORK,
Defendant-Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW YORK.

APPELLEE'S BRIEF.

February 2, 1938.

✓ WILLIAM C. CHANLER,
*Corporation Counsel of the
City of New York,
Attorney for Appellee,
Municipal Building,
New York, N. Y.*

✓ PAXTON BLAIR,
✓ OSCAR S. COX,
✓ DAVIDSON SOMMERS,
✓ SOL CHARLES LEVINE,
of Counsel.

IN THE
Supreme Court of the United States
October Term, 1937—No. 436

BROOKLYN AND QUEENS TRANSIT CORPORATION,
Plaintiff-Appellant,
against
THE CITY OF NEW YORK,
Defendant-Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW YORK.

APPELLEE'S BRIEF.

Opinions Below.

The opinion of the Special Term of the Supreme Court of New York in *New York Rapid Transit Corporation v. The City of New York* (Case No. 435), on the authority of which that Court decided the case at bar (R. 2), is unofficially reported in 97 N. Y. L. J. 241. The memorandum of the Appellate Division of the Supreme Court of New York, First Department (R. 54-55), is reported in 251 App. Div. (N. Y.) 710. The memorandum of the Court of Appeals of New York (R. 55-56) is reported in 275 N. Y. 454, 11 N. E. (2d) 293. The opinion of the Court of Appeals of New York in the *New York Rapid Transit Corporation* case,

which was argued and decided at the same time as the case at bar and on the authority of which the case at bar was decided by the Court of Appeals (R. 56), is reported in 275 N. Y. 258, 9 N. E. (2d) 858.

Jurisdiction.

An order allowing appeal (R. 62) was signed by the Chief Judge of the State on August 24, 1937. On October 25, 1937, this Court noted probable jurisdiction.

Question Presented.

Are New York City Local Laws Nos. 2 and 30 of 1935, adopted pursuant to authority conferred by the Legislature of the State to enable the appellee to raise funds to be earmarked for unemployment relief, and imposing a tax equal to 3% of gross receipts upon the exercise of franchises by a class of public utilities which includes the appellant, *constitutional*, or do they violate (1) the due process clause of the Fourteenth Amendment, or (2) the equal protection clause of the Fourteenth Amendment?

The State Court of last resort upheld the statutes against both challenges. 275 N. Y. 454; R. 55-56.

Statutes Involved.

The statutes involved are set forth in the record as follows:

- N. Y. Laws 1934, ch. 873, R. 23;
- N. Y. Laws 1935, ch. 601, R. 25;
- N. Y. C. Local Law No. 2 of 1935, R. 27;
- N. Y. C. Local Law No. 30 of 1935, R. 37.

Statement.

The case is here upon appeal from a judgment of the Supreme Court, New York County, entered upon a remittitur from the Court of Appeals, State of New York, in an action for money had and received to recover taxes paid under protest on the ground that the taxing statutes are unconstitutional. To the Court of Appeals was certified (Civil Practice Act, § 588 [4]) this question (R. 54): "Does the [amended] complaint herein state facts sufficient to constitute a cause of action?" And the question was answered in the negative (R. 56) in a unanimous decision without opinion (R. 55). Both lower courts were reversed, interlocutory orders denying motions to dismiss the complaint were vacated, and a final order and judgment entered dismissing the complaint with costs in all courts (R. 58).

1. The Amended Complaint.

The amended complaint alleges that the plaintiff is a domestic street railway corporation engaged in the operation of certain street surface railroads in the City of New York and is

"under the supervision of the Transit Commission, which is the Metropolitan Division of the Department of Public Service" (R. 3).

Reference is then made (R. 4) to the Enabling Acts and the Local Laws of the City of New York passed thereunder, and it is alleged that Local Law No. 2 of 1935 imposes upon the class to which the plaintiff belongs * an excise tax equal to 3% of its gross income for the year 1935. By the same

* That is, utilities subject to the jurisdiction of the Transit Commission or the Public Service Commission of the State.

Local Law, utilities not subject to the Transit Commission or Public Service Commission are subjected to a tax of 3% of their gross operating income (R. 4-5).

Local Law No. 2 of 1935 was reenacted to cover an additional period of time (without changes of substance) by Local Law No. 30 of 1935. Its application to the plaintiff is set forth at Record 4-7.

The provisions for the earmarking of the proceeds of the tax for unemployment relief are referred to at Record 7.

The plaintiff then alleges that it has paid to the City, under protest, the sum of \$756,879.50 pursuant to the local laws in question (R. 9).

Various other statutes and the taxes the plaintiff has to pay to the State and the City in order to operate under its franchises are detailed in paragraphs 20-24 of the amended complaint (R. 10-12).

The limitation of the plaintiff to a five-cent fare is set forth at Record 12.

The operation of certain new municipal subway lines directly by the defendant in competition with the plaintiff is alleged at Record 13.

The failure to tax taxicabs, though they compete with the plaintiff, is alleged at Record 14.

The fact that these taxes, though imposed for State purposes, are confined to utilities operating within the territorial limits of New York City, is alleged at Record 15.

As a further grievance it is alleged (R. 15-16) that the tax operates with peculiar severity on the plaintiff because the operating and maintenance expenses of railroad corporations "are far higher in proportion to gross receipts than the operating and maintenance expenses of corporations engaged in other types of business, but included in

the same class" subjected to taxation by the local laws in question.

Inequality is pleaded in Paragraph 37 in these terms (R. 16):

"The imposition of the tax is a plainly arbitrary method of collecting money for unemployment relief purposes in the easiest way without any thought of or attempt at equal distribution of the tax burden in proportion to benefits or to capacity to pay on the part of the respective persons and corporations taxed, or to the value of the privilege taxed."

A summary of grievances is found in paragraph 38, where it is alleged that the local laws, as well as the Enabling Acts, (1) impair the obligations of franchise contracts between the City and the plaintiff or its predecessors in title; (2) violate the due process clause in making a fair return on plaintiff's invested capital impossible, in exacting money from one group for the benefit of another group (the unemployed), in measuring the tax by gross rather than by net income, and in taxing the plaintiff without regard to benefits received from the project the tax is aimed to support; and (3) violate the equal protection clause in that they single out one group for an especially heavy tax, they do not tax equally persons engaged in transporting passengers for hire, they do not operate throughout the State though the taxes imposed are for State purposes, they make a discrimination based upon subjection *vel non* of the taxpayer to the supervision of the Transit Commission or Public Service Commission, they operate with especial burdensomeness on transportation companies because of the severity of the competition they are subjected to and because of their inability to charge more than a five-cent fare, and they tax at the same rate the gross income of different types of corporations "which are so essentially dif-

ferent in character that the ratio of net income to gross receipts in the case of one is radically less than in the case of another, * * * (R. 16-20).

2. The Defendant's Motion to Dismiss the Complaint.

The defendant, upon due notice, moved in the court of first instance (R. 2)

"for an order dismissing the complaint herein and directing judgment for the defendant, on the grounds that the complaint does not set forth facts sufficient to state a cause of action and that the Court has no jurisdiction of this action, and for such other and further relief as to this Court may seem just and proper."

The jurisdictional question raised by the motion is no longer in the case, the Court of Appeals having held in the companion case that the Court did have jurisdiction of an action at law in the premises.

3. The Decision of the Court of Appeals.

No opinion was given by the Court of Appeals. The order denying defendant's motion to dismiss the complaint was reversed (R. 56) upon the authority of *New York Rapid Transit Corporation v. The City of New York* (No. 435) which was argued simultaneously with the present case.

Summary of Argument.

Upon the record as outlined above, we propose to argue as follows:

1. The separate classification of utilities was not a denial of equal protection. Although the proceeds of the tax were earmarked for unemployment relief, the classi-

fication was not required to be based on considerations other than those sufficient to support a general revenue tax since (1) the burdens of the tax need not be apportioned to the benefits derived; and (2) the alleged defect could be removed by separation of tax and appropriation. And in any event the possible legislative considerations amply justify the classification.

2. Uniform treatment of rapid transit companies and other utilities is not a denial of equal protection since the Fourteenth Amendment does not forbid incidental inequalities arising from uniform treatment and since the legislature would have been justified in classifying rapid transit companies separately from other utilities. (Under this same point we shall deal briefly with appellant's claim of hostile discrimination in violation of the due process clause.)

Argument.

This is a companion case to *New York Rapid Transit Corporation v. The City of New York*, No. 435, present term, which is being argued simultaneously herewith. The issues in the two cases are substantially identical, so far as the appeals in this Court are concerned, except that the contention made by New York Rapid Transit Corporation in Case No. 435 that the local laws impair the obligation of its contract with the City is, as appellant here concedes (Brief, p. 16), not involved in the present case.

Therefore in order to avoid unnecessary duplication, we adopt, as the argument in support of appellee's contentions on this appeal, the arguments made under Points I and II (pp. 9-24) in appellee's brief in Case No. 435, and hereby incorporate the same herein by reference.

Conclusion.

The judgment appealed from should be affirmed, with costs.

Dated, New York, N. Y., February 2, 1938.

Respectfully submitted,

WILLIAM C. CHANLER,
Corporation Counsel
of the City of New York,
Attorney for Appellee.

PAXTON BLAIR,
OSCAR S. COX,
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IN THE
Supreme Court of the United States
October Term, 1937

Nos. 435 and 436

NEW YORK RAPID TRANSIT CORPORATION
Appellant
against

THE CITY OF NEW YORK

BROOKLYN AND QUEENS TRANSIT CORPORATION
Appellant
against

THE CITY OF NEW YORK

**ON APPEALS FROM THE SUPREME COURT OF THE
STATE OF NEW YORK**

**PETITION OF THE APPELLANTS
FOR REHEARING**

GEORGE D. YEOMANS
Attorney for Appellants

HAROLD L. WARNER
PAUL D. MILLER
Of Counsel

IN THE
Supreme Court of the United States

October Term, 1937

Nos. 435 and 436

NEW YORK RAPID TRANSIT CORPORATION,
Appellant,
against

THE CITY OF NEW YORK.

BROOKLYN AND QUEENS TRANSIT CORPORATION,
Appellant,
against

THE CITY OF NEW YORK.

**ON APPEALS FROM THE SUPREME COURT OF THE
STATE OF NEW YORK**

**PETITION OF THE APPELLANTS
FOR REHEARING**

*To the Honorable the Chief Justice and the
Associate Justices of the Supreme Court
of the United States:*

The appellants above named, appreciating that the
Court has given careful consideration to these cases, but

believing that there is one aspect thereof which has escaped attention and which, if considered, might change the decision, do hereby respectfully petition this Court for a limited rehearing of the appeals herein, and in support of such petition submit the following:

The intolerable hardship to which the appellants and all other New York City transit companies are subjected by the Local Laws in question is not due merely to the failure of the City, in imposing the tax, to "make meticulous adjustments", but is attributable to deliberate, hostile discrimination against them.

The Court's opinion in these cases answers appellants' claim of discrimination by saying that "the legislature is not required to make meticulous adjustments in an effort to avoid incidental hardships" and "if the accidents of trade lead to inequality or hardship, the consequences must be accepted as inherent in government by law instead of government by edict".

There is no doubt that where a tax is applied to a broad class of taxpayers the details of whose individual businesses are unknown to the legislature, the latter is not required to make an exhaustive study of the ability of the various members of the class to pay the tax and then make meticulous adjustments so as to provide for exact equality. That would be an impossible undertaking. Where, however, as here, the taxed class includes only the utilities operating in one city, comprising a mere handful of corporations, and where the City, by reason of being virtually in partnership with two of them (New York Rapid Transit Corporation and Interborough Rapid

Transit Company) and by reason of its franchise contracts with the others, knows full well, without any study whatever, that, due to fare limitations which the City has refused to change and due to severe competition by the City itself, the transit companies, comprising, in number, almost half of the entire taxed class, are in a wholly different position from the other utilities and in fact in a poorer position than ordinary businesses to bear the burden of a heavy gross earnings tax, the taxing of these transit companies at the same rate on gross income as the other utilities, and at a rate thirty times as high as that applied to ordinary businesses, cannot be attributed to a mere failure to make meticulous adjustments, but can only be attributed to deliberate, hostile discrimination.

Unless one shuts one's eyes to realities, it is perfectly obvious that the transit companies were picked upon, along with other utilities, to pay a cruel and unjust tax because it was politically expedient to put the burden upon them and because they were at the mercy of the City, being unable to move away as other businesses might. Moreover, the tax could be collected from their properties whether they remained solvent or went into receivership. Plainly, the Fourteenth Amendment does not sanction a tax classification on such a basis. Repeatedly, this Court has stated that a discrimination which is arbitrary and unreasonable, and which is hostile as against particular persons or classes is forbidden by the Fourteenth Amendment. If the discrimination as against the transit companies, which is revealed by the complaints in these cases, is not unjust and hostile, the question may well be asked as to when and under what circumstances a tax can ever be unconstitutional because it involves unreasonable and hostile discrimination against a particular class or particular persons.

On March 22, 1938, in addressing the new City Council of the City of New York on the subject of unemployment relief taxes, Mayor F. H. LaGuardia reviewed the history of the administration of unemployment relief by the City of New York and the taxes imposed for that purpose. He cited the City administration's "discovery" of the tax on the gross income of public utility companies, and stated with respect thereto as follows (see the City Record for March 29, 1938):

"Among the taxes that we have levied, gentlemen, was the so-called utility tax, 3% on the gross income of public utility companies. There was a great deal of opposition to that. *It was a cruel tax and it is a cruel tax on the income particularly of those public utilities that are limited in their income. I refer particularly to the three transit companies.*

"That tax was attacked. The City of New York developed it up to the highest Court. That tax brought in \$18,000,000." (Italics ours.)

Here we have an admission by the Chief Executive of the City that the tax in question, as applied to the transit companies, is a "cruel" tax, and it is cruel because it is unjust and unreasonable in the discrimination which it involves.

We submit that the allegations in the complaint, showing the contracts of the appellants with the City, the refusal of the City to consent to any increase in the rate of fare, the building of new railroads operated by the City itself in competition with and under the same streets in which elevated and street surface railroad lines are operated by the transit companies, and, in the face of all this, the imposition of this most unjust tax upon those transit companies are quite sufficient to show that the

resulting hardship to the transit companies is not the result of a mere failure by the City to "make meticulous adjustments", but is attributable to wholly unreasonable, unjust and hostile discrimination against a few corporations, whose position as compared with that of other utilities and as compared with that of business in general was well known to the City at the time it imposed the tax. If this tax is to be sustained then it may be doubted whether the Constitution gives any protection against arbitrary and hostile discrimination in the field of taxation.

Conclusion

Despite the carefully prepared opinion and the unanimous decision of the Court, handed down on March 28, 1938, the appellants plead for a limited rehearing of the appeals herein, because the outcome of these cases is to them a matter, ultimately, of life or death.

Politics are at the bottom of this tax, and the very purpose of the Fourteenth Amendment was to protect any person or corporation from unjust and hostile discrimination at the hands of politicians. Were it not for politics the City of New York would put its own subways, as well as the privately operated lines, on a paying basis by raising the rate of fare, and if it did so the emergency taxes in question would not be necessary, or, if still imposed, would not be unjust and hostile in their discrimination as they are now and as they will continue to be so long as the City refuses to consent to an increase in the rate of fare. The tax budget of the City for the current year includes an amount of over \$33,000,000 for debt service on corporate stock issued by the City of New York to raise the money

which was spent in construction of City-owned railroads, this being necessary because the railroads are operated at a loss. That sum is almost twice the amount collected from the utilities when the City was collecting the full 3% of their gross incomes. If the City would but make the railroads self-supporting, this \$33,000,000, taken from the taxpayers, would not have to be used to make up for losses on the subways, but could be used for other purposes, including unemployment relief.

The City's plight, therefore, if it had to return the taxes collected from the transit companies, would be by no means serious. The position of the transit companies, on the other hand, is hopeless if they can be made the victims of politics and can obtain no relief under the Constitution from a tax which is so plainly attributable to hostile discrimination.

Believing that this broader aspect of the nature and extent of the discrimination involved in this taxation has escaped the attention which it deserves, the appellants plead for a rehearing of the appeals herein, on this one ground alone.

GEORGE D. YEOMANS,
*Attorney for the Appellants, New York
Rapid Transit Corporation and Brook-
lyn and Queens Transit Corporation.*

HAROLD L. WARNER,
PAUL D. MILLER,
Of Counsel.

. April 21, 1938.

I hereby certify that the foregoing petition for a re-hearing is presented in good faith and not for delay.

HAROLD L. WARNER,
Counsel for Appellants.

SUPREME COURT OF THE UNITED STATES.

Nos. 435, 436.—OCTOBER TERM, 1937.

New York Rapid Transit Corporation,
Appellant,

435

vs.

The City of New York.

Brooklyn and Queens Transit Corpora-
tion, Appellant,

436

vs.

The City of New York.

Appeals from the Supreme
Court of the State of
New York.

[March 28, 1938.]

Mr. Justice ~~REED~~ delivered the opinion of the Court.

The question for decision is the constitutional validity of Local Laws of the City of New York (Local Law No. 21 of 1934, as amended by Local Law No. 2 of 1935, and extended by Local Law No. 30 of 1935) which provide, § 2, that "for the privilege of exercising its franchise or franchises, or of holding property, or of doing business in the City of New York" an excise tax shall be paid by every "utility" doing business in the City of New York during 1935 and the first six months of 1936.

"Utility" is defined, §1(e), to include "any person subject to the supervision of either division of the department of public service," and every person, whether or not subject to such supervision, engaged "in the business of furnishing or selling to other persons, gas, electricity, steam, water refrigeration, telephony and/or telegraphy" or service in these commodities. Each utility is required to pay a tax "equal to three percentum of its gross income" received during the effective period of the Local Laws, with a minor variation not here assailed for utilities not subject to the specified supervision.¹ The Local Laws specify that all revenues from the tax "shall be deposited in a separate bank account or accounts, and shall be available and used solely and exclusively for the purpose of relieving the people of the City of New York from the

¹ Utilities subject to the supervision of the department of public service pay three per cent. of their "gross income," as defined by § 1(e); the other utilities pay three per cent. of their "gross operating income," as defined by § 1(d).

hardships and suffering caused by unemployment" (§ 14). The Local Laws, admittedly passed under authority granted by the state legislature,^{*} are assailed under the United States Constitution. For convenience we shall discuss the contentions of the New York Rapid Transit Corporation alone, as determination of the objections raised by it is conclusive of those advanced by the Brooklyn and Queens Transit Corporation.

The New York Rapid Transit Corporation operates rapid transit railroads in the City of New York under a contract known as Contract No. 4, dated March 19, 1913, made pursuant to the New York Rapid Transit Act, Laws 1891, c. 4, as amended, between its predecessor (New York Municipal Railway Corporation) and the City. As a common carrier engaged in the operation of rapid transit railroads, the corporation is under the supervision of the transit commission, the head of the metropolitan division of the State department of public service. Accordingly, but under protest, it paid the taxes imposed by the Local Laws set out above, for the months January, 1935, to June, 1936, inclusive. It brought this action against the City of New York to recover the amounts paid, \$1,408,697, with interest, on the ground that the Local Laws are unconstitutional. The case arises on the City's motion to dismiss the complaint.

The Supreme Court of New York, Special Term, denied the motion to dismiss the complaint and found that the Local Laws denied equal protection because of gross inequality of burden in comparison with other utilities. This order was affirmed by the Appellate Division of the Supreme Court, without opinion, on a 3-2 vote (251 App. Div. 710). The Court of Appeals reversed (275 N. Y. 258), upheld the Local Laws against all attacks, and ruled that the complaint did not state a cause of action. Appeal was taken to this Court under Section 237(a) of the Judicial Code, 28 U. S. C. § 344(a).

The Corporation challenges the Local Laws as violative of the equal protection and due process clauses of the 14th Amendment and the contracts clause of Article I, Section 10, of the Constitution.

^{*} N. Y. Laws 1934, c. 873, authorized any city of a million inhabitants to impose for purposes of unemployment relief any tax within the powers of the state legislature, including a tax on gross income or gross receipts of those doing business in the city. The act specifically provided (§ 2) that the revenues shall be deposited in a separate bank account and used solely for the relief purposes. The authority granted by this statute expired December 31, 1935, but was extended, with certain restrictions not material here, until July 1, 1936, by N. Y. Laws 1935, c. 601.

I. *Classification.* No question is or could be made by the Corporation as to the right of a State, or a municipality with properly delegated powers, to enact laws or ordinances, based on reasonable classification of the objects of the legislation or of the persons whom it affects. "Equal protection" does not prohibit this. Although the wide discretion as to classification retained by a legislature, often results in narrow distinctions, these distinctions, if reasonably related to the object of the legislation, are sufficient to justify the classification. *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389, 418; *Atchison, Topeka, etc. R. R. v. Mathews*, 174 U. S. 96, 105; *Giozza v. Tiernan*, 148 U. S. 657. Indeed, it has long been the law under the 14th Amendment that "a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it," *Rast v. Van Deman and Lewis*, 240 U. S. 342, 357; *Borden's Company v. Baldwin*, 293 U. S. 194, 209; *Metropolitan Casualty Co. v. Brownell*, 294 U. S. 580, 584. "The rule of equality permits many practical inequalities." *Magoun v. Illinois Trust and Savings Bank*, 170 U. S. 283, 296; *Breedlove v. Suttles*, 302 U. S. 277, 281; *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495, 509. "What satisfies this equality has not been and probably never can be precisely defined." *Magoun v. Illinois Trust and Savings Bank*, *supra*, 293.

The power to make distinctions exists with full vigor in the field of taxation, where no "iron rule" of equality has ever been enforced upon the states. *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 237; *Giozza v. Tiernan*, 148 U. S. 657, 662. A state may exercise a wide discretion in selecting the subjects of taxation (*Magoun v. Illinois Trust and Savings Bank*, 170 U. S. 283, 294; *Quong Wing v. Kirkendall*, 223 U. S. 59, 62; *Heisler v. Thomas Colliery Co.*, 260 U. S. 245, 255) "particularly as respects occupation taxes", *Oliver Iron Mining Co. v. Lord*, 262 U. S. 172, 179; *Brown-Forman Co. v. Kentucky*, 217 U. S. 563, 573; *Southwestern Oil Co. v. Texas*, 217 U. S. 114, 121, 126; see *Ohio Oil Co. v. Conway*, 281 U. S. 146, 159.

Since carriers or other utilities with the right of eminent domain, the use of public property, special franchises or public contracts, have many points of distinction from other businesses, including relative freedom from competition, especially significant with increasing density of population and municipal expansion,

these public service organizations have no valid ground by virtue of the equal protection clause to object to separate treatment related to such distinctions. Carriers may be treated as a separate class (compare *Seaboard Air Line v. Seegers*, 207 U. S. 73) and, as such, taxed differently or additionally. *Southern R. Co. v. Watts*, 260 U. S. 519, 530. This Court has approved the adoption of modes and methods of assessment and administration peculiar to railroads (*Kentucky Railroad Tax Cases*, 115 U. S. 321, 337), and upheld tax rates for railroads differing from those on other property, and as between railroad taxpayers, *Michigan Central R. Co. v. Powers*, 201 U. S. 245, 300; *Ohio Tax Cases*, 232 U. S. 576, 590; *Columbus & G. Ry. Co. v. Miller*, 283 U. S. 96. Similarly, we have explicitly recognized that a state may subject public service corporations to a special or higher income tax than individuals or other corporations. *Atlantic Coast Line R. Co. v. Doughton*, 262 U. S. 413, 424. The Corporation concedes this general right to set apart the utilities in New York for taxation.

The Corporation is brought within the purview of the Local Laws because "utility" is defined to include those "subject to the supervision of the department of public service." § 1(e). It contends that classification in an excise tax, however, should be made by specific reference to the character of the business to be taxed, and that it is arbitrary to make taxability depend on whether a person is subject to the supervision of a commission. Valid reason for the definition utilized appears from the fact that the Local Laws merely adopted the classification previously established in the New York Public Service Law (N. Y. Laws 1910, c. 480, as amended) which had selected those offering several kinds of public services, including the transportation of persons and property (§ 25),² and made them subject to the supervision of the department of public service.

Several reasons may be suggested for the selection for special tax burdens of the utilities embraced by the Local Laws under discussion. We mention a few. Those subject to the supervision of the department of public service are assured by statute that new private enterprises may not enter into direct competition without a showing of convenience and necessity for the public service³ (see

² Others are the production and/or furnishing of gas, electricity, steam, and water, communication by telegraph or telephone, omnibus transportation. New York Public Service Law, §§ 64, 78, 89-a, 90, 60.

³ New York Public Service Law (Laws 1910, c. 480), as amended: § 53 (railroad; street railroad); § 63-d (omnibus); § 68 (gas; electricity); § 81 (steam); § 89-c (water); § 99(1) (telephone and telegraph).

New York Steam Corp. v. City of New York, 268 N. Y. 137, 147). The Corporation suggests that the statute does not curb competition from the City's own rapid transit lines and from taxicabs. Freedom from unlimited, direct, private competition is of itself a sufficient advantage over ordinary businesses to warrant the imposition of a heavier tax burden. Reports which must be filed with the department of public service on the basis of approved systems of accounting suggest an administrative convenience in the collection and verification of the tax* which might properly have been taken into account by the City's legislature. See *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495, 511, and cases cited. The legislature may reasonably have conceived that the revenues of utilities furnishing indispensable services are subject to relatively little fluctuation, even in depression times, and reasonably have shaped its tax system accordingly.

II. *Discrimination.* The Corporation urges here, as the lower state courts held, that these general principles of classification are not effective to validate legislation where, as in these Local Laws, arbitrary, unreasonable and hostile discrimination against certain railroad companies is shown. This unlawful discrimination appears, because "they are," as the Corporation sees it, "in a far poorer position to bear the burden of unemployment relief than is business in general." Business may pass on taxes. Other utilities may apply to the commission and perhaps to the courts for an adequate rate increase. This Corporation cannot do so as by Contract No. 4 with the City it is bound to furnish transportation for a five-cent fare, which by City Charter provision cannot be changed without the approval of the proposal by a majority of the qualified voters, on referendum.⁸ It is alleged in the complaint that rapid transit corporations are less able to pay a gross receipts tax than other utilities, whose gross income yields a higher percentage of profit, that the operation and maintenance expenses of these corporations are higher in relation to gross receipts than those

* Operating revenues are reported by railroads. See, e.g., Transit Commission, *Summary of Reports of Rapid Transit, Street Surface Railway and Bus Companies operating in the City of New York for the Quarter April-June, 1935*, and for the Fiscal Year Ended June 30, 1935; *Id.*, Quarter, April-June, 1936, and for the Fiscal Year Ended June 30, 1936.

⁸ City of New York, Local Law No. 16 of 1925.

The argument is applicable in No. 436. There the limitation on fare exists in a franchise, alleged in the complaint to be beyond the regulatory power of the transit commission.

of other utilities, the ratio of net income to gross receipts, lower. It is said to be highly discriminatory to classify these railroads apart from other businesses, or in the same group as other utilities. The differences from business are not enough and from other utilities too great to justify this attempted classification, which sets them apart from business as a whole, and yokes them with other utilities.

The disadvantages complained of, as to fare limitations, are applicable only to the Corporation, a single member of a class of utilities. It is quite fortuitous that this particular corporation must seek adjustments in fare in a peculiar way. "The legislature is not required to make meticulous adjustments in an effort to avoid incidental hardships," see *Great Atlantic & Pac. Tea Co. v. Grosjean*, 301 U. S. 412, 424. "If the accidents of trade lead to inequality or hardship, the consequences must be accepted as inherent in government by law instead of government by edict." *Fox v. Standard Oil Co.*, 294 U. S. 87, 102.

In comparing its burdens with those of other utilities, the Corporation, by its argument, suggests that a gross receipts tax is invalid while a net income tax is valid. In taxing utilities as a class the legislature is not required to make "meticulous adjustments" for a particular sub-class of utility, see *Great Atlantic & Pac. Tea Co. v. Grosjean*, 301 U. S. at 424, *supra*. Moreover, while taxation of net income is apportioned to ability to pay, and is therefore "an equitable method of distributing the burdens of government," see *New York ex rel. Cohn v. Graves*, 300 U. S. 308, 313, it is not a compulsory method. There are other justifications for the gross receipts tax. Unconcerned with disputes about permissible deductions, it has greater certitude and facility of administration than the net income tax, an important consideration to taxpayer and tax gatherer alike. And the volume of transactions indicated on the taxpayer's books may bear a closer relation to the cost of governmental supervision and protection than the annual profit and loss statement. In *Clark v. Titusville*, 184 U. S. 329, we rejected an equal protection objection to a license tax on merchants, which we said (p. 334) was "a tax on the privilege of doing business regulated by the amount of sales, and . . . not repugnant to the Constitution of the United States." And we have heretofore had occasion to remark that gross receipts from an occupation constitutes an "appropriate measure of the privi-

lege" of engaging in that occupation, *Western Live Stock v. Bingham*, — U. S. —, decided February 28, 1938; *American Manufacturing Co. v. St. Louis*, 250 U. S. 459, 463; *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217, 228.

Reliance is placed upon certain language of the opinion in *Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550. But the tax on retailers held invalid in that case increased in rate with increasing volume. The Court said that the excise was laid upon the making of a sale, and that the statute "exact[s] from two persons different amounts for the privilege of doing exactly similar acts because the one has performed the act oftener than the other" (p. 566). For that reason it was thought necessary to inquire whether the tax could be justified as related to ability to pay, an inquiry we need not here pursue. The Court did not condemn a fixed-rate gross receipts tax, such as is involved in the present case. Indeed it suggested that the "desired end" might have been secured by the widely adopted "flat tax on sales" (p. 563), and indicated by way of contrast that though such a tax "would impose a heavier burden on the taxpayer having the greater volume of sales" the graduated tax under consideration exacted not only a larger gross amount but one "larger in proportion to sales" (p. 564).

III. Relation to Object of Legislation. As a further ground for the invalidity of the Local Laws the Corporation urges that "the classification must rest upon some ground of difference, having a fair and substantial relation to the object of the legislation." It is asserted and correctly so, that the Local Laws in question, as well as the State enabling statutes, show by their titles and content that the proceeds of the challenged taxes were for the relief of unemployment. Violation of the rule invoked, it is asserted, occurs from the discrimination shown by the legislation in raising "a special fund for the particular purpose" from taxpayers no more responsible than others for the conditions. The Corporation seems to be of the opinion that no "state or city can, without conflict with the Con-

* N. Y. Laws 1934, c. 873 (the enabling act):

"An Act to enable, temporarily, any city of the state having a population of one million inhabitants or more to adopt and amend local laws, imposing in any such city any tax and/or taxes which the legislature has or would have power and authority to impose to relieve the people of any such city from the hardships and suffering caused by unemployment and to limit the application of such local laws.

"§ 2. Revenues resulting from the imposition of taxes authorized by this act shall be paid into the treasury of any such city and shall not be credited

stitution, adopt a tax statute, which states a specific object sought to be accomplished thereby and which at the same time puts the entire burden of the tax upon one particular class of business, even though that class is in no different position in relation to the object sought to be accomplished than business in general." The brief states the point to be "that there is a distinction between the ordinary excise tax with no specific purpose attached thereto, and a tax which is a part of a plan for the accomplishment of a specified object." The "object of the legislation," to the taxpayer, is apparently the relief of unemployment.

While, of course, the object of this legislation is in a sense to relieve unemployment, this is the object of the appropriation of the proceeds of the tax. The "object", as used in the rule and cases referred to by the Corporation, is the object of the taxing provisions, i. e., the raising of the money. If the designation of utilities as the only taxpayers under the legislation in question does not deny to them the equal protection of the laws, the fact that an appropriation of the funds for relief is a part of the legislation is not significant. "A tax is not an assessment of benefits." *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495, 522. Taxes are repeatedly imposed on a group or class without regard to responsibility for the creation or relief of the conditions to be remedied. *Idem*, note 14, p. 522: The *Carmichael* case in-

or deposited in the general fund of any such city, but shall be deposited in a separate bank account or accounts and shall be available and used solely and exclusively for paying the principal amount of any installment of principal and of interest due during the aforesaid period on account of the ten-year serial bonds sold to obtain moneys to pay for home relief and work relief in any such city in the month of November, nineteen [fol. 48] hundred thirty-three, and for the relief purposes for which the said taxes have been imposed under the provisions of this act."

Local Law No. 21 of 1934, as amended by Local Law No. 2 of 1935:

"A local law to relieve the people of the city of New York from the hardships and suffering caused by unemployment and the effects thereof on the public health and welfare, by imposing an excise tax on the gross income of every person doing business within such city and subject to supervision of either division of the department of public service, and of any and all other utilities doing business within such city to enable such city to defray the cost of granting unemployment, work and home relief.

"§ 14 Disposition of Revenues.—All revenues and moneys resulting from the imposition of the taxes imposed by this local law shall be paid into the treasury of the city of New York and shall not be credited or deposited in the general fund of the city of New York but shall be deposited in a separate bank account or accounts, and shall be available and used solely and exclusively for the purpose of relieving the people of the city of New York from the hardships and suffering caused by unemployment, including the repayment of moneys borrowed for such purpose."

volved a state act which levied a tax on employers of eight or more to provide unemployment benefits for workers employed by this class of employers. It was urged that the classification should have been based on the unemployment record of the employer, i. e., should have borne a relation to the object of unemployment relief. Against this contention, that there was no relation between the class of taxpayers and the purpose for which the fund was raised, this Court held that it is not necessary that there be "such a relationship between the subject of the tax (the exercise of the right to employ) and the evil to be met by the appropriation of the proceeds (unemployment)" p. 522. See also *Cincinnati Soap Co. v. United States*, 301 U. S. 308, 313. The Corporation suggests that in the *Carmichael* case there was a special relationship between the class taxed and the purpose for which the proceeds were spent, but the Court expressly said that this was something "the Constitution does not require" (p. 523). There need be no relation between the class of taxpayers and the purpose of the appropriation.

The cases cited by the Corporation to sustain its contention that classification must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, do not support the conclusion that the "object" referred to is the purpose for which the proceeds are to be spent. These authorities rather support the view that the "object" is the revenue to be raised by the acts. In *Colgate v. Harvey*, 296 U. S. 404, it was recognized that the classification "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation" (p. 423) but it was said (p. 424) that "the object of the act . . . simply is to secure revenue." In *Stebbins v. Riley*, 268 U. S. 137, *Royster Guano Co. v. Virginia*, 253 U. S. 412, and *Air Way Appliance Corporation v. Day*, 266 U. S. 71, the rule contended for by the Corporation was recognized but with no intimation that the "object" was considered to be the purpose for which the proceeds of the tax were spent. The "object" of the Local Laws under consideration, as in the case with most tax statutes, was obviously to secure revenue. In some cases a classification of taxpayers may be upheld as having a fair and substantial relation to a constitutional non-fiscal object (*Alaska Fish Co. v. Smith*, 255 U. S. 44, 48; *Quong Wing v. Kirkendall*, 223 U. S. 59, 62, 63; *Aero Mayflower Transit Co. v. Georgia Public Service Commission*, 295 U. S. 285, 291), but it is not constitutionally necessary that the classification be related to the appropriation. In *United States v.*

regulate
Butler, 297 U. S. 1, also relied upon by the Corporation, the attack on the Federal statute was successful because the tax was said to be a part of an unconstitutional scheme to ~~produce~~ production through expenditures. It was not held invalid because there was no relation between the taxpayer and the appropriation. See *Cincinnati Soap Co. v. United States*, *supra*. We conclude, therefore, that the provisions of the legislation earmarking the funds collected are not of importance in determining whether or not the classification of the challenged acts is discriminatory.

What we have said in showing that the Local Laws do not deny the equal protection of the laws also disposes of the Corporation's contention that the Local Laws constitute a deprivation of due process, as being measured without regard to the net income of or ruinous effect on the taxpayers, and as laying on a particular class a burden which should be borne by all.

*IV. Contracts Clause.** The Corporation contends that, in contravention of the Constitution, Article 1, Section 10, the Local Laws impair the obligation of the contract known as Contract No. 4, entered into March 19, 1913, between its predecessor and the City, under which it operates its owned and leased properties in New York.

By the terms of the contract, as summarized in the Corporation's complaint, the City agreed to construct certain rapid transit railroads, and the New York Municipal Railway Corporation, appellant's predecessor, agreed to contribute a portion of the cost of construction and to equip the railroads for operation. The latter further agreed to reconstruct and build additions to certain existing railroads, which it then had the right and duty to operate, so as to adapt them for operation in conjunction with the railroads to be constructed by the City. Under the terms of Contract No. 4, the City leased the railroads which it agreed to construct, and their equipment, which was to be furnished by the lessee, to the New York Municipal Railway Corporation, its successors and assigns, for a term of forty-nine years commencing on or about the first day of January, 1917, and the lessee agreed to operate said railroads to be constructed by the City in conjunction with the existing railroads as one system, and for a single fare not exceeding five cents.

* In No. 436, the legislation is not challenged as an impairment of an obligation of contract. The Brooklyn and Queens Transit Corporation "does not operate under Contract 4, but under street railroad franchise from the City."

The gross receipts of all the railroads combined from whatever source derived, directly or indirectly, were to be pooled. The City and its lessee were to share the receipts equally after the deduction of certain items provided in Article XLIX of Contract No. 4. It will suffice here if we summarize the provisions for deductions in the language of appellant. The deductions were for the following purpose and in the following order:

- “ 1. Rentals actually paid by Lessee under leases approved by the Commission;
2. Taxes [The full provision as to ‘taxes’ is set forth later];
3. Operating expenses exclusive of maintenance;
4. Charges for maintenance of both the Railroad and the Existing Railroads [Railroad refers to the system to be constructed by the City; Existing Railroads refers to the company-owned lines as they existed at the time of execution of the contract];
5. Charges for depreciation of the Railroad, the equipment, and the Existing Railroads;
6. To be retained by the Lessee: $\frac{1}{4}$ th of \$3,500,000, representing the average income from operation of the Existing Railroads;
7. To be retained by the Lessee: $\frac{1}{4}$ th of 6% per annum on (a) the Lessee’s contribution to cost of construction of the Railroad, (b) cost of equipment furnished by the Lessee, (c) cost of extensions and additional tracks constructed by the Lessee, and (d) cost of reconstruction of Existing Railroads (out of which quarterly payments the Lessee is required to amortize such costs);
8. To be retained by the Lessee: $\frac{1}{4}$ th of the actual annual interest payable by Lessee upon the cost of additional equipment, plus an amortization charge;
9. To be paid to the City: $\frac{1}{4}$ th of the annual interest payable by it upon its share of the cost of construction of the Railroad plus an amortization charge;
10. To be paid to the City: $\frac{1}{4}$ th of the annual interest payable by the City upon cost of construction of additions to the Railroad plus an amortization charge;
11. 1% of the gross receipts, to be paid into a contingent reserve fund.

“In connection with the above allocation provisions, Contract No. 4 provided (Art. LI) that if in any quarter the gross receipts should be insufficient to meet the various obligations and deductions above recited, the deficits should be cumulative, and payment thereof should be made in the order of priority above set forth.”

The Corporation does not claim that Contract No. 4 exempts it or its property from taxation generally. It does assert that the City

"may not, in the exercise of its governmental power, subject appellant to the payment of a tax on or measured by the gross receipts of the combined system of railroads," and that "by providing in specific terms for the disposition and allocation of the entire gross receipts, the parties necessarily precluded any kind of tax or charge by the City which would directly and specifically alter such disposition and allocation, to appellant's prejudice, except in so far as any such tax or charge may clearly be said to have been provided for in the contract provisions as to the disposition of gross receipts."

The Corporation further complains that the tax payments deprive it of "a substantial part of the interest and sinking fund allowance to which it was entitled" under deductions Nos. 7 and 8 set out above. The loss thus suffered was alleged to total more than \$600,000.

We search in vain for any provision in the contract which expressly exempts the Corporation from payment of this tax, or indeed of any tax. Yet this is what is required before support can be obtained from the contracts clause. More than a hundred years ago it was stated by Chief Justice Marshall, in *Providence Bank v. Billings*, 4 Pet. 514, 563, that the taxing power is of such "vital importance" that "We must look for the exemption in the language of the instrument; and if we do not find it there, it would be going very far to insert it by construction." In *Erie Ry. Co. v. Pennsylvania*, 21 Wall. 492, 499, this Court said that "the language in which the surrender is made must be clear and unmistakable." At the present term, the Court has reiterated that contracts of tax exemption are "to be read narrowly and strictly," *Hale v. State Board*, 302 U. S. 95, 109. See also *Pacific Co. v. Johnson*, 285 U. S. 480, 491; *Puget Sound Power & Light Co. v. Seattle*, 291 U. S. 619, 627.

Not only is the Corporation unable to point to an unmistakable exemption, but the contract itself contains an express provision permitting the deduction of taxes from the gross receipts.* Its language is broad. It refers to "all taxes . . . of every description (whether on physical property, stock or securities, corporate or other franchises, or otherwise) assessed or which may hereafter be assessed against the Lessee in connection with . . . the

* The clause reads as follows: "Taxes, if any, upon property actually and necessarily used by the Lessee in the operation of the Railroad and the Existing Railroads, together with all taxes or other governmental charges of every

operation of the . . . Railroads." The taxes under discussion clearly come within its terms.

It is alleged that at the time of the execution of the contracts, and prior to the passage of the State enabling acts,¹⁰ the tax power of the City was confined to special assessments for public improvements, and ad valorem taxes on real estate and special franchises issued by the City. The Corporation insists that it was contemplated that no other type of tax would be assessed, and that it was not necessary to make provision for exemption since the Corporation was merely accepting the tax burden common to all owners of property. It is urged that the contract be interpreted from this point of view, and the provision limited to taxes of the type which the City could have imposed in 1913.

There is no reason to limit the ordinary meaning of words used in a contract by men prepared to invest under its terms. " . . . a business proposition involving the outlay of very large sums cannot be and is not taken by the parties concerned according to offhand impressions; it is scrutinized phrase by phrase and word by word." *New York v. Sohmer*, 237 U. S. 276, 284; cf. *Ohio Ins. Co. v. Debolt*, 16 How. 416, 435.

Where the intention was to prevent the imposition of new taxes, adequate language was available. The court below adverted to its opinion in *Brooklyn Bus Corp. v. City of New York*, 274 N. Y. 140, where the contract entitled the corporation to a broader tax exemption because it provided that "any new form of tax or additional charge that may be imposed by any ordinance of the city or resolution of the Board upon or in respect of the franchise . . . shall be deducted from the compensation payable to the City hereunder"

A similar suggestion that the contract be limited to the taxes known at the time of its making was urged upon us, and discarded, in *J. W. Perry Co. v. Norfolk*, 220 U. S. 472. Under a lease made by Norfolk in 1792, when Norfolk was a borough without power to tax, the lessee agreed to pay, in addition to rent, "the public taxes which shall become due on said land." The lessee sought to enjoin the

description (whether on physical property, stock or securities, corporate or other franchises, or otherwise) assessed or which may hereafter be assessed against the Lessee in connection with or incident to the operation of the Railroad and the Existing Railroads. Also such assessments for benefits as are not properly chargeable to cost of construction or cost of equipment."

¹⁰ See *supra* note 2.

collection of taxes in 1906 by the City of Norfolk, on the ground that the parties contemplated only taxes imposed by Virginia or the United States. This Court held that the language was broad enough to cover the city tax, saying (p. 480), that "the provision that the lessee was to 'pay public taxes' was sufficiently comprehensive to embrace municipal taxes whenever they could thereafter be lawfully assessed on land or the improvements which were a part of the land. Where one relies upon an exemption from taxation, both the power to exempt and the contract of exemption must be clear. Any doubt or ambiguity must be resolved in favor of the public."

Admitting that with respect to a franchise contract silent as to taxes the city may validly impose a license tax on the privilege of doing business, since "surrender of the state's power to tax the privilege is not to be implied from the grant of it," *Puget Sound Power & Light Co. v. Seattle*, 291 U. S. 619, 627, it is urged by the Corporation that here the City is violating the affirmative covenants of a contract, namely, the provisions for allocation of revenue. The contention is made that these provisions preclude an "alteration" by virtue of a gross receipts tax.

This Court, in construing a contract to determine whether or not legislation is violative of its provisions within the meaning of the contract clause of the Constitution, will examine for itself the existence and meaning of the contract as well as the relation of the parties and the circumstances of its execution. *Appleby v. City of New York*, 271 U. S. 364, 379-380; *Funkhauser v. Preston Co.*, 290 U. S. 163, 167; *Violet Trapping Co. v. Grace*, 297 U. S. 119, 120. But of course in so doing we "lean toward agreement with the courts of the state, and accept their judgments as to such matters unless manifestly wrong," *Hale v. State Board*, 302 U. S. 95, 101; *Tampa Waterworks v. Tampa*, 199 U. S. 241, 243-244; *Southern Wisconsin Ry. Co. v. Madison*, 240 U. S. 457, 461. In this case the Court of Appeals of New York, 275 N. Y. 258, 268, has determined that "the right to tax cannot be lost by such tenuous implication," i. e., on the theory that the tax enables the City to secure a portion of the gross income in contravention of the contract. We see no reason for disagreeing with the conclusion of the Court of Appeals of New York upon this point.

In effect, the Corporation is urging that a constructive condition restricting the City's power of taxation should be incorporated in the contract, by speculation as to what the parties must necessarily

have intended, despite the long standing rule that exemptions must be "clear and unmistakable." *Erie R. Co. v. Pennsylvania*, 21 Wall. 492, and other cases, all cited *supra*.

The Corporation professes to dread an interpretation of the contract and the legislation, which will put it "wholly at the mercy" of the City; under which the Corporation's "gross receipts would be disposed of, not as Contract No. 4 provides, but as the City may from time to time in its wisdom determine." The Corporation is not deprived of its right to resist on constitutional or legal grounds whatever tax or assessment may be imposed upon it or its property. The City can not lay a gross receipts tax on the Corporation unless it selects a class of taxpayers which meets the requirement of the equal protection of the laws. The provisions of the contract as to taxes are certainly not sufficiently explicit to justify us in denying to the City the right to collect such taxes as those involved in this litigation. The danger which the Corporation sees from what it considers to be a violation by legislation of its contract rights is a danger which every utility, with a franchise which does not protect its property from additional taxation, must endure.

Convincing precedent for the contention of the City is found in *North Missouri R. Co. v. Maguire*, 20 Wall. 46, where this Court considered a statute of Missouri which provided that the railroad could issue bonds having priority over the State's mortgage. The act made specific provision for the allocation of the earnings of the Railroad Company in much the same manner as Contract No. 4 does in the present case. The act established a "fund commissioner" and provided that the railroad company should pay over to this commissioner "all the gross earnings and daily receipts." It was provided that the commissioner should first pay amounts required for "actual current expenditures;" should then make other specified deductions, and lastly, should apply any excess to certain first mortgage bonds and then against the railroad's debt to the State.

Subsequently the State Constitution was amended to provide that an annual tax of 10% of the gross receipts should be levied on the North Missouri Railroad Company and two other named corporations. The state court held that the earlier statute constituted a contract but considered the payment of taxes to fall within "current expenditures for carrying on the ordinary business." In this

Court, the company argued that the tax constituted a violation of this contract, since it overturned the allocation of receipts and had the effect of converting the State from a junior creditor to a first mortgagee.

This Court agreed that "serious difficulty" would arise if "the ordinance was a mere change of the order of disbursing the receipts and earnings," instead of "an expression of the sovereign will of the people of the State levying taxes to pay and discharge the indebtedness of the State," but concluded that the tax actually imposed was proper. Of the provisions for allocation of the gross receipts, the Court said (p. 63):

"Further examination of those provisions is certainly unnecessary, as it is too plain for argument that they do not afford the slightest support to the views of the plaintiffs. On the contrary, they are entirely silent upon the subject of taxation, and fully justify the remarks of the State court when they say that the subject of taxation forms no part of the contract contained in the act under consideration.

"Nothing is said about taxation, and it does not seem to have entered into the contract between the parties, but was obviously left where the law had placed it before the act was passed, nor was any provision made for the payment of taxes unless it may be held that the disbursements for that purpose may fairly be included in such as are required to pay the current expenditures in carrying on the ordinary business of the corporation."

In our opinion, as the contract does not prohibit this tax, the legislation does not violate the contracts clause.

Affirmed.

Mr. Justice Stone and

^ Mr. Justice CARDOZO took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.